TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 425

MIDLAND NATIONAL BANK OF MINNEAPOLIS,
PETITIONER,

vs.

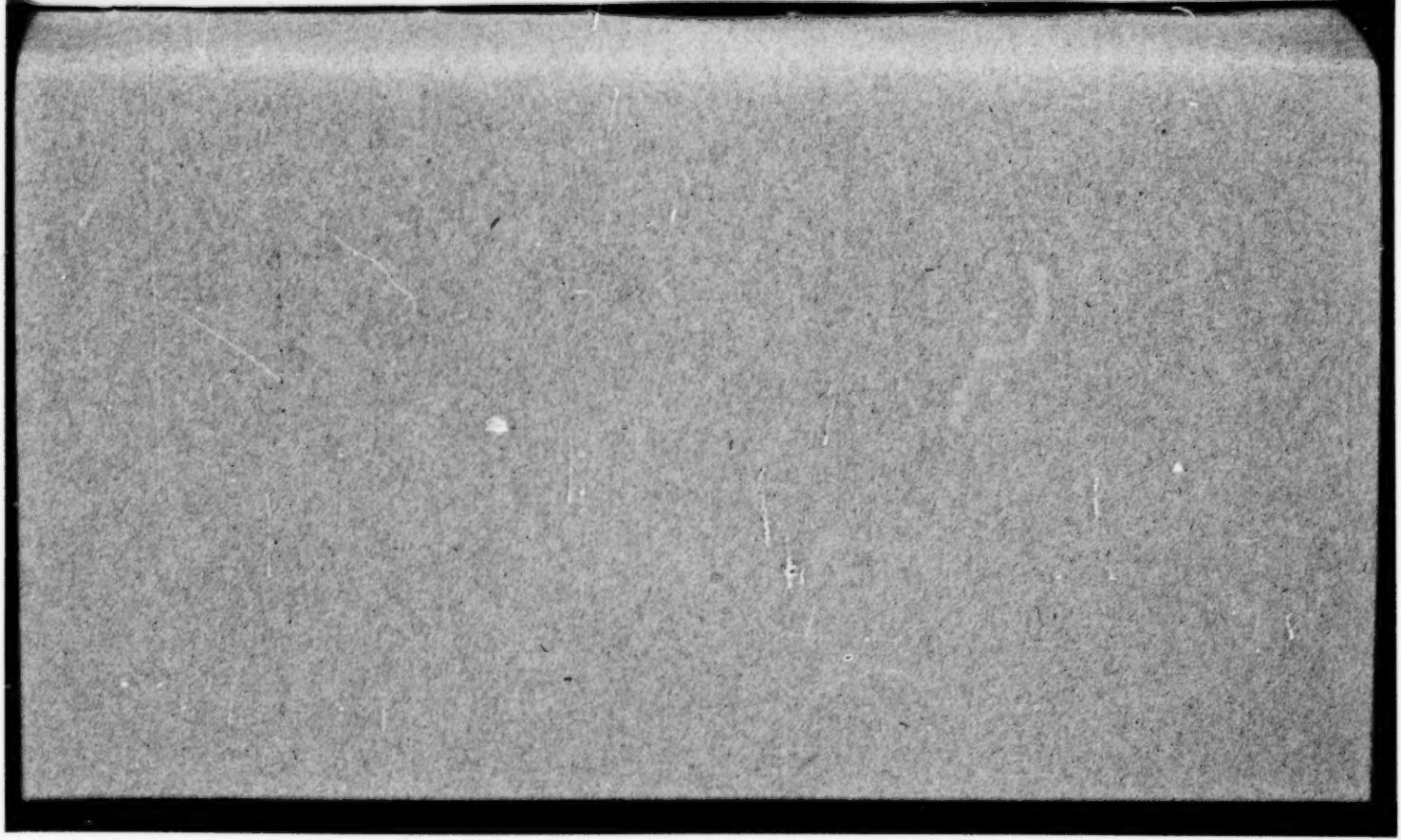
DAKOTA LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 4, 1927

CERTIORARI GRANTED OCTOBER 31, 1927

(32,877)



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[fol. a] [Caption omitted]

[fol. 1]

IN DISTRICT COURT OF HENNEPIN COUNTY

THE MIDLAND NATIONAL BANK OF MINNEAPOLIS,
a Corporation, Plaintiff,

vs.

DAKOTA LIFE INSURANCE COMPANY, a Corporation,
Defendant

SUMMONS

The State of Minnesota to the above named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, which complaint is hereto attached and herewith served upon you, and to serve a copy of your answer thereto upon the subscribers, at their office No. 401 New York Life Building, in the City of Minneapolis, in said County and State, within twenty days after the date of the service of this summons upon you, exclusive of the day of service; and if you fail to answer the said complaint within the time and in the manner aforesaid, plaintiff will take judgment against you for the sum of Nine Thousand Seven Hundred Twenty-four and 6/100 Dollars ($9,724.06), with interest thereon at the rate of six per cent per annum, together with plaintiff's costs and disbursements.

Dated October 15, 1923.

Ueland & Ueland, Plaintiff's Attorneys, 401 New York Life Building, Minneapolis, Minnesota.

[fol. 2] IN DISTRICT COURT OF HENNEPIN COUNTY

[Title omitted]

COMPLAINT—Filed November 2, 1923

Plaintiff complains of defendant and alleges:

1. That plaintiff during all the times herein mentioned was, and still is, a national banking association under the

laws of the United States having its banking offices at Minneapolis, Minnesota.

2. That defendant during all the times herein mentioned was, and still is, a corporation created and existing under the laws of the State of South Dakota, and authorized and licensed to do business as an insurance company in the State of Minnesota.

3. That on May 14, 1920, defendant in consideration of a premium of $108.50, and of the sum of $394.20, to be paid to it during the life of one Oscar Mosher, on November 28, 1920 and annually on the 28th day of November thereafter, made and delivered to said Oscar Mosher its policy of insurance Number 18260 and thereby insured the life of said Oscar Mosher in the sum of $10,000.00 payable to the estate of said Oscar Mosher immediately upon receipt of due proof of the death of said Oscar Mosher by defendant.

4. That thereafter on or about October 10, 1921, said Oscar Mosher, for valuable consideration, by an assignment in writing attached to said policy duly assigned said policy to one J. E. Jacobson of Dazey, North Dakota, together with all the money assured or to become due by or under said policy and the full benefit thereof; that a duplicate of said assignment was, on October 18, 1921, duly filed at the Home office of defendant and the receipt thereof was duly acknowledged by defendant.

5. That thereafter on or about February 26, 1923, said Oscar Mosher and said J. E. Jacobson, for valuable consideration, by an assignment in writing attached to said policy duly assigned said policy to plaintiff, together with all the moneys assured or to become due by or under said policy [fol. 3] and the full benefit thereof; that a duplicate of said assignment was, on March 2, 1923, duly filed at the Home office of defendant and the receipt thereof was duly acknowledged by defendant.

6. That said Oscar Mosher died on September 10, 1923, while said policy was in full force and effect at his residence on a farm northeast of Dazey, North Dakota.

7. That up to the time of the death of said Oscar Mosher all premiums which accrued on said policy were paid on or

before the times agreed upon by and between said Oscar Mosher and defendant; that the time for the payment of the premium of $394.20 originally due on said policy on November 28, 1922, was, by written agreement, entered into between said Oscar Mosher and defendant on November 27, 1922, and in consideration of the sum of $118.26 and the further sum of $16.56 as interest paid to defendant, extended for one year; that said agreement provided that in the event of said Oscar Mosher's death within said period of extension, the sum insured should be paid subject to deduction of said premium of $394.20 originally due on November 28, 1922 and that said sum of $118.26 should in that event be repaid.

8. That on October 12, 1923, plaintiff duly gave defendant notice and proof of death of said Oscar Mosher, as provided in said policy.

9. That both said Oscar Mosher and plaintiff have duly performed all conditions required in said policy to be by them respectively performed.

10. That on October 12th, 1923, and after plaintiff had given defendant notice and proof of death as aforesaid, plaintiff demanded payment of the amount due on said policy, and under said extension agreement, to-wit: the sum of $9,724.06, from defendant, but no part thereof has been paid.

Wherefore plaintiff demands judgment for $9,724.06, with interest thereon at the rate of 6 per cent per annum, together with plaintiff's costs and disbursements.

Ueland & Uelan, Plaintiff's Attorneys, 401 New York Life Bldg., Minneapolis, Minnesota.

[fol. 4] *Duly sworn to by Edgar L. Mattson. Jurat omitted in printing.*

(Endorsed:) Service 4:15 P. M. Insurance Department State of Minnesota.

Service of within made and accepted and a copy filed in this office and copy forwarded to Company this 15th day of October, A. D. 1923.

George W. Wells, Jr., Insurance Commissioner.

[File endorsement omitted.]

In District Court of Hennepin County

Notice of Petition for Removal—Filed Nov. 5, 1923

To Ueland & Ueland, Attorneys for Plaintiff:

You are hereby notified, that the defendant in the above entitled action will present to the Judge in chambers of the above named Court and file with the above named Court, at the Court House in the City of Minneapolis, Minnesota, on this the 2nd day of November, 1923, at 4:00 o'clock P. M. of said day or so soon thereafter as counsel can be heard, its duly verified petition for the removal of this cause into the District Court of the United States for the District of Minnesota, Fourth Division, together with its bond with good and sufficient surety, all in accordance with the act of Congress in such case made and provided, and the defendant will at said time and place request the above named Court to [fol. 5] accept said petition and bond and order said cause removed from this Court into the said District Court of the United States and to proceed no further in said action.

And said defendant herewith serves upon you a true and correct copy of said petition and of said bond.

Dated November 2nd, 1920.

O'Malley & O'Malley, Attorneys for Defendant, 900-905 Guardian Life Bldg., St. Paul, Minnesota. Hanten & Hanten, Of Counsel, Watertown, South Dakota.

In District Court of Hennepin County

[Title omitted]

Petition for Removal to Federal Court—Filed Nov. 5, 1923

To the Honorable District Court of Hennepin County, Minnesota:

The petition of Dakota Life Insurance Company, a corporation, defendant in the above entitled action, respectfully shows to this Honorable Court:

I

That your petitioner is defendant in the above entitled action.

II

That said action has been commenced against it in said Court by said plaintiff, and that said action is of a civil nature.

III

That said plaintiff in its complaint herein claims in substance that a policy was issued by the defendant on the life of Oscar Mosher, a resident of North Dakota, in the State of North Dakota, in the sum of Ten Thousand ($10,000.00) [fol. 6] Dollars; that the moneys to grow due thereon were assigned by said Mosher to one J. E. Jacobson of Dazey, North Dakota, and thereafter assigned by said Mosher and Jacobson to the plaintiff; that by the death of the said Mosher on the 12th of October, 1923, plaintiff claims to be entitled under said policy and assignment to the sum of Nine Thousand Seven Hundred Twenty-four and 06/100ths ($9,724.06) Dollars, for which it demands judgment against defendant together with the costs, disbursements and interest.

IV

That your petitioner disputes said claim and denies all liability on said policy and the said assignments, and that it has been advised by its counsel after fully stating the facts that it has a good and meritorious defense to said action.

V

That the matter in dispute in this action exceeds the sum of Three Thousand ($3000.00) Dollars, exclusive of interest and costs.

VI

That the controversy in this action and every issue of fact and law therein is wholly between citizens of different states, and it can be fully determined between them, that is to say, the plaintiff The Midland National Bank of Minneapolis, is now, and was at the time of the filing of the com-

plaint in this action, a citizen and resident of the State of Minnesota, and the defendant Dakota Life Insurance Company, a corporation, was then, and still is, a citizen and resident of the State of South Dakota; that the policy of insurance was written by the defendant in the State of North Dakota on the life of a resident of North Dakota at the time of such writing, and thereafter until his death, that is, that the assignment to J. E. Jacobson was executed in North Dakota, said Jacobson being then and now a resident of North Dakota; that the assignment to the plaintiff The Midland National bank was executed by the said Mosher and Jacobson, both residents of North Dakota, in North Dakota; that notice of both assignments was accepted by defendant in the State of South Dakota; that the claim of plaintiff does not arise out of any business or transaction done in the State of Minnesota.

VII

That the time for your petitioner as defendant in this action to answer or plead to the complainant in said action has not yet expired and will not so expire until the 5th day of November, 1923, and your petitioner has not yet pleaded, answered or in any way appeared therein.

[fols. 7 & 8] Your petitioner therefore prays that this Court proceed no further herein, except to make the order of removal as required by law and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said court as provided by law, and as in duty bound your petitioner will ever pray.

Dated November 2nd, 1923.

Dakota Life Insurance Company, by John B. Hanten, as President. O'Malley & O'Malley, Attorneys for Petitioner, 900-905 Guardian Life Bldg., St. Paul, Minnesota. Hanten & Hanten, of Counsel, Watertown, South Dakota.

Duly sworn to by John B. Hanten. Jurat omitted in printing.

Bond on removal for $500.00 approved and filed Nov. 5, 1923, omitted in printing.

[fol. 9] (Endorsed.)

Due service of within Notice is hereby admitted at Minneapolis, Minnesota, this 2nd day of November, A. D. 1923, & Petition and Bond.

Ueland & Ueland, Attorneys for Plaintiff.

[File endorsement omitted.]

In District Court of Hennepin County.

[Title omitted]

Order of Removal—Filed November 5, 1923

The defendant having presented to this Court its petition for the removal of this action to the District Court of the United States for the District of Minnesota, Fourth Division, together with its bond with surety, in accordance with the Act of Congress in such case made and provided, and such bond and surety having been duly approved by the Court,

It is Ordered, That said petition and the bond be, and the same are hereby accepted, and that this action be removed to said United States District Court, and that this Court proceed no further therein.

Dated November 2, 1923.

W. W. Bardwell, Judge District Court.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 10] In United States District Court, District of Minnesota, Fourth Division

At Law. No. 1294

Midland National Bank of Minneapolis, a Corporation, Plaintiff,

vs.

Dakota Life Insurance Company, a Corporation, Defendant

Amended Answer—Filed January 18, 1924

Now comes the defendant above named and makes its amended answer to the complaint of the plaintiff herein as follows:

I

It denies each and every allegation, matter and thing contain in paragraphs numbered "III," "IV," "V" and "IX" of said complaint, save insofar as the same are hereinafter admitted by the allegations hereof.

Further answering, this defendant alleges:

II

That on May 14th, 1920, one J. E. Jacobson was, and for some time prior thereto had been, an agent of this defendant engaged in soliciting applications for life insurance and writing policies of life insurance for this defendant at Dazey, North Dakota, and in the territory directly tributary thereto.

[fol. 11] III

That on the said 14th day of May, 1920, one Paul M. Kellogg was, and for a long time prior thereto had been, a physician and surgeon duly licensed to carry on and practice his profession as such in the State of North Dakota, and that during all of said times he was residing at Rogers, North Dakota.

IV

That said Oscar Mosher on said 14th day of May, 1920, was, and for a long time prior thereto had been, afflicted with, and suffering from, a disease and ailment of the lungs known as pulmonary tuberculosis. That said pulmonary tuberculosis had reached an advanced stage in said Mosher, and that on said 14th day of May, 1920, he was in imminent danger of death therefrom, and there was no hope or chance of his recovery therefrom.

V

That said Mosher on said 14th day of May, 1920, and for a long time prior thereto was not, and had not been, in good physical and bodily health and condition by reason of said disease, and that he was not, and had not been at said time, a fit or safe subject for live insurance.

VI

That all of these said facts relative to the health and physical and bodily condition of said Mosher were on said 14th day of May, 1920, and for a long time prior thereto had been, well known to said Mosher, to said Kellogg and to said Jacobson.

VII

That on said 14th day of May, 1920, said J. E. Jacobson was, and for a long time prior thereto had been, the president of the Dazey State Bank, a banking corporation, created, organized and existing under the laws of the State of North Dakota, and engaged in carrying on a general banking business at Dazey in said State.

VIII

That on and prior to said 14th day of May, 1920, said Mosher was indebted to said Dazey State Bank in a substantial sum of money, the exact amount whereof is unknown to this defendant.

[fol. 12]

IX

That at the times hereinbefore mentioned said Mosher was unable to perform any work or labor on account of his

said physical condition and was unable to pay his said indebtedness to said bank and was unable to pay anything on account thereof.

X

That shortly prior to said 14th day of May, 1920, said Dazey State Bank, said Jacobson, said Mosher and said Kellogg, well knowing of the facts hereinbefore alleged, entered into a conspiracy to defraud this defendant by inducing and causing it to issue a policy on the life of said Mosher in the sum of Ten Thousand ($10,000.00) Dollars, payable to the estate of said Mosher or his assigns, and to procure an assignment of said policy immediately after its issue to said Dazey State Bank as security for the said indebtedness, all in anticipation of the early death of the said Mosher.

XI

That for the purpose of carrying out said conspiracy, it was agreed among said conspirators that said Jacobson acting on behalf of defendant would engage said Kellogg to make a physical examination of said Mosher; that said Kellogg would falsely represent and certify to said defendant that he had determined as a result of his examination that said Mosher was a fit and proper insurance risk, and that he would further certify — represent to defendant that all false answers to questions touching on his health made by said Mosher were true; that said Mosher would give false answers to all questions asked him relating to his health and desirability as an insurance risk; that said Dazey State Bank would pay all premiums required by defendant to be paid as a consideration for writing said policy of insurance; that said Jacobson would accept on behalf of defendant said application for said insurance and falsely represent to defendant that said Mosher was a good insurance risk; that after said policy was issued, said Mosher would assign the same to said Dazey State Bank.

XII

That in furtherance of said conspiracy, said Oscar Mosher on the 14th day of May, 1920, signed a written application for insurance in this defendant for the sum of Ten

[fol. 13] Thousand ($10,00.00) Dollars. That said application was attached to said policy of insurance, and by reference made a part of the contract; and that the said application contains this provision:

"I hereby Agree:

"That this application and the policy hereby applied for, taken together, shall constitute the entire contract between the parties hereto, and I hereby declare that all of the answers and statements made above and those that shall be made to the medical examiner are true, and that this contract shall not take effect until the first premium has been paid during my good health. To have the required medical examination made within thirty days by a physican appointed by the company, or within such time thereafter as may be fixed in writing."

XIII

That in furtherance of said conspiracy said Jacobson procured said Kellogg to make a medical examination of said Mosher. That this defendant required a medical examination to be made of each and every person applying to it for life insurance, which fact said Jacobson well knew. That said Kellogg was not the regular medical examiner in said vicinity for this defendant, which fact was also well known to said Jacobson, That as part of such medical examinations, blanks were furnished by defendant to its agents, containing lists of questions to be put to applicants by said medical examiner, and by said applicant answered. That it was the duty of such medical examiner to record such answers as were made to such questions by said applicants.

XIV

That in furtherance of said conspiracy said Mosher submitted himself for physical examination to said Kellogg on the 14th day of May, 1920. That said Kellogg as part of said medical examination asked said Mosher if he had ever suffered from any ailment or disease of the lungs. That in response to this question said Mosher answered "No." That said Kellogg further asked Mosher this question: "Has any person in your family or your immediate house-

hold ever suffered or died from consumption?" That said Mosher answered this question "No."

And that said Kellogg further asked said Mosher this question:

[fol. 14] "Have you ever raised or spat blood?" And that said Mosher answered this question "No." That said Kellogg wrote down and recorded each of said answers so made by said Mosher to said questions in said blank furnished him for said purpose.

XV

That each and all of said statements and representations so made by said Mosher in the form of said answers to said questions were false and untrue in (a) That he was at the time that he made same, and for a long time prior thereto had been, suffering from a disease and ailment of the lungs known as pulmonary tuberculosis, and was at said time in the last stages thereof; (b) in that a person, viz: one Pearl Ladbury, had died from consumption on or about November 23rd, 1919, while a member of his, said Mosher's, family, and in his immediate household, and in that she had suffered from said disease for a period of nine years prior to her death, and during all of that time had been such member of his family and living in his immediate household, and (c) In that he had at numerous times and on numerous occasions raised and spat blood.

XVI

That said Mosher at the time he made said representations well knew that the same were false and untrue as aforesaid; that each and all thereof were so made by him in furtherance of said conspiracy, for the purpose of defrauding this defendant, and causing it to issue its policy of insurance on his life in the sum of Ten Thousand ($10,000.00) Dollars. That each and all of said representations were material and materially affected the risk assumed by this defendant in writing its policy of insurance.

XVII

That the truth of each and all of said representations and statements so made by said Mosher was warranted by him to this defendant.

XVIII

That in furtherance of said conspiracy, said Kellogg wrote down said answers so made by said Mosher with full knowledge of their falsity. That in furtherance of said conspiracy said Kellogg represented and stated to this defendant that he had examined the lungs of said Mosher on said 14th day of May, 1920, and that he found no evidence [fol. 15] of past or present disease thereof. That on said 14th day of May, 1920, said Kellogg further stated and represented to this defendant that said representations and statements so made by said Mosher in the form of answers to questions as hereinbefore alleged, were all full, complete and true as far as he knew.

XIX

That the said statements and representations so made by said Kellogg were false and untrue, in that he did find evidence of both past and present disease in the lungs of said Oscar Mosher, viz: Pulmonary tuberculosis, and in that he well knew when he made said statement and representation that said Mosher was suffering from tuberculosis of the lungs in its last stages and in that he well knew at the time that he made said representations and statements that said Mosher had frequently raised and spat blood and in that he well knew that said Ladbury had died a member of said Mosher's family and in his immediate household, from consumption, and had suffered from, and been afflicted with, the same for over nine years while such member of his family and in his immediate household.

XX

That said Kellogg well knew that each and all of the said representations so made by him were in all things false and untrue, and he so made each and all of them in furtherance of said conspiracy, for the purpose of defrauding this defendant and inducing it to insure the said life of said Mosher in the said sum of Ten Thousand ($10,000) Dollars; that each and all of the statements and representations so made to this defendant by said Kellogg were material.

XXI

That in furtherance of said conspiracy said Jacobson accepted the application of said Mosher on behalf of this defendant and fraudulently omitted to disclose to this defendant, although it was his duty as agent to do so, the facts as to the said condition of said Mosher's physical and bodily health, as hereinbefore alleged, and fraudulently omitted and failed to disclose to this defendant the fact that said Mosher at the time he signed said application was in the final stages of said pulmonary tuberculosis, which fact said Jacobson well knew as hereinbefore alleged.

[fol. 16] XXII

That this defendant believed each and all of said representations so made by said Mosher, Jacobson and Kellogg to be true, and in reliance upon the truth thereof, and not otherwise, was induced to, and in fact did, issue its policy of insurance on the life of said Oscar Mosher in the sum of Ten Thousand ($10,000.00) Dollars, on May 14th, 1920.

XXIII

That a premium of One Hundred Eight and 50/100ths ($108.50) Dollars was paid on the issuance of the policy, and further premiums in the sum of Three Hundred Ninety-four and 20/100ths ($394.20) Dollars were required to be paid on November 28th, 1920, and each 28th of November annually thereafter.

XXIV

That in furtherance of said conspiracy, said Dazey State Bank paid said premium of One Hundred Eight & 50/100ths ($108.50) Dollars, and each and all other premuims that were thereafter paid to this defendant on account of said policy, and that no premium or premiums thereon were ever paid by any other person or persons.

XXV

That upon its issuance said policy was transmitted by this defendant to said J. E. Jacobson at Dazey, North

Dakota, for the purpose of delivery by him to said Oscar Mosher when and while he, said Mosher, was in good health, on payment of the first premium by him.

XXVI

That at the time of the payment of said first premium by said Dazey State Bank, said Mosher was not in good health, but was still suffering from said pulmonary tuberculosis and in the last stages thereof, and that said policy of insurance was never delivered to said Mosher during his good health, or otherwise, or at any other time.

XXVII

That said Mosher continued not to be in good health and continued to suffer from said tuberculosis, and in said last stages thereof, until the 10th day of September, 1923, at which said time he died. That the cause of death of said Oscar Mosher was said pulmonary tuberculosis.

[fol. 17]

XXVIII

That had this defendant known at the time of issuing its said policy that said statements and representations, or any thereof, were false and untrue, it would not have issued its said policy of insurance. That had this defendant known of the said condition of said Mosher it would not have issued said policy of insurance. That had this defendant known of the failure and omission of said Jacobson to disclose to it the said information as to the said condition of said Mosher, and said member of Mosher's family and household, it would not have issued said policy.

XXIX

That by reason of the facts hereinbefore alleged, and all of the same, said policy was void in its inception, and was not, and never has been, in force and effect.

XXX

That in furtherance of said conspiracy said Mosher on the 17th day of July, 1920, executed an instrument in writ-

ing whereby he purported to assign said policy of insurance to the said Dazey State Bank of Dazey, North Dakota. That at this said time this said policy of insurance was in the possession of the Dazey State Bank, and that it had so been ever since its receipt by said J. T. Jacobson. That, as hereinbefore alleged, during all times here in question, said J. E. Jacobson was the president of said bank, and that his son H. L. Jacobson was cashier thereof, and that said bank and all of its affairs were under the direction, management, control and domination of said J. E. Jacobson.

XXXI

That said written instrument recites that the assignment was made in consideration of One Dollar and other valuable consideration, and that it also contains the following recital:

"This assignment is given to secure the payment to the said party of the second part of the sum of as per designated amount of — Dollars, according to the tenor and conditions of several promissory notes."

XXXII

That ever since the said 17th day of July, 1920, the Dazey State Bank has claimed, and still claims, to be the owner of [fol. 18] said policy by virtue of said assignment, and that it has asserted a claim against this defendant in an action brought in the District Court of Cass County, First Judicial District, State of North Dakota, for the full proceeds thereof maturing on the death of said Mosher.

XXXIII

That on the 10th day of October, 1921, an instrument in writing was executed purporting to assign said policy of insurance from said Oscar Mosher and Dazey State Bank to said J. E. Jacobson. That the consideration named therein is one dollar and other valuable considerations, and that it contains the following recital:

"This assignment is given to secure the payment of the said party of the second part of the sum of as per designated amount of — Dollars, according to the tenor and conditions of several promissory notes."

That said instrument is signed by Oscar Mosher and Dazey State Bank, by H. L. Jacobson, cashier. That at the time that said Oscar Mosher so signed said instrument, he was in great physical and mental anguish and distress from the ravages of said disease, and was under the complete control of said J. E. Jacobson. That to induce said Mosher to sign said assignment, said J. E. Jacobson represented to him that the debt said Mosher was owing to said bank had been assigned to him, Jacobson, which representation was entirely false and untrue, but that the same was believed by said Mosher to be true, and that he so signed said instrument in that belief. That said Dazey State Bank never authorized said H. L. Jacobson to sign or execute said assignment on its behalf, and that it never authorized any other person or persons to execute or sign said instrument on its behalf. That said purported assignment was not a bona fide transaction, and was a fraud on said bank, perpetrated by said J. E. Jacobson and his said son H. L. Jacobson. That said policy of insurance was stolen from the said bank by said J. E. Jacobson and said purported assignment procured by him for the purpose of divesting said bank of its security in the form of said policy, and thereby defrauding it, its creditors and stockholders, and appropriating the same, and any proceeds that might arise therefrom to his own use.

XXXIV

That said Mosher was never indebted at any time to said J. E. Jacobson, and that said bank was not indebted to said [fol. 19] J. E. Jacobson, and that there was not any consideration whatsoever for said purported assignment, and that said indebtedness owing from said Mosher to said Bank was never assigned by the said bank to said Jacobson.

XXXV

That thereafter and on the 26th day of February, 1923, said Jacobson procured said Mosher to join with him in executing a purported assignment of said policy to plaintiff.

XXXVI

That said Mosher was never indebted to the plaintiff and no debt owing from him to the said Dazey State Bank was ever assigned to plaintiff. That plaintiff never acquired any interest in said policy, or any right or interest in or to the proceeds thereof by virtue of the said purported assignment.

XXXVII

That there was no consideration for said purported assignment to plaintiff and that the same was invalid and in fraud of the rights of the Dazey State Bank, of Dazey, North Dakota.

XXXVIII

That it is provided by the terms of said policy of insurance that:

"No assignment hereof shall be binding upon the company unless made by an instrument in writing endorsed on this policy or attached hereto, and the company shall not be deemed to have notice of such an assignment unless the original or duplicate thereof is filed at the Home Office of the Company and its receipt duly acknowledged. The Company will not assume the responsibility for the validity of an assignment."

That this defendant received notice of each of said assignments, and that it acknowledged such receipt and signified its approval thereof, but that it did so without knowledge of the facts hereinbefore alleged. That if it had known at the time of the existence of the state of things hereinbefore set forth, it would have refused to approve any of said assignments. That its said approval to each assignment was made subject to all of the terms and conditions of said policy.

[fol. 20]

XXXIX

That said assignment from said Mosher and said Jacobson was given to plaintiff as security for a loan made by it to said Jacobson.

XXXX

That at the time that said assignment was so made to plaintiff, both Jacobson and plaintiff represented to said Mosher that the said indebtedness of said Mosher to said Dazey State Bank had been assigned by said bank to said Jacobson and by said Jacobson to this plaintiff, which representation was in all things false and untrue, in that said indebtedness had not been assigned by said bank to said Jacobson and had not been assigned by said Jacobson to this plaintiff; that said representation was so made with knowledge of its falsity for the purpose of inducing said Mosher to make said assignment, and he believing the same to be true, was thereby induced to, and in fact did, join with said Jacobson in said assignment.

XXXXI

That at the time that this defendant approved said assignment to plaintiff, it had no notice of the facts alleged in the next preceding paragraph hereof, and that it gave its approval to said assignment in the belief that said indebtedness of said Mosher to said bank had been assigned by said bank to Jacobson and by Jacobson to plaintiff.

XXXXII

That if it had known that said indebtedness had not been so assigned by said bank to said Jacobson, and by said Jacobson to plaintiff, it would not have given its approval of said assignment. That if it had known that said assignment to plaintiff was given merely as collateral security for a debt of Jacobson to plaintiff, and had it known that this plaintiff had no insurable interest in the life of said Mosher, it would not have given its approval of said assignment.

XXXXIII

That this defendant was not informed and did not know of the falsity of any of said representations, and was not informed and did not know of the fraudulent conspiracy against it; nor of the true facts as to said assignments or any of them at the time that it received and accepted any

[fol. 21] of the premiums paid on account of said policy of insurance, and was not informed and did not know the truth relative to any of said matters at the time that it executed the extension agreement alleged in paragraph "VII" of the complaint herein.

XXXXIV

That this defendant was not informed and did not know that Oscar Mosher was not in good health at the time that the first premium was paid on said policy and was not informed and did not know that said Oscar Mosher was suffering from pulmonary tuberculosos at the time the first premium was paid.

XXXXV

That each and all of said premiums paid on account of said policy were received and accepted by this defendant without knowledge on its part, and in ignorance, of the fact that said Oscar Mosher was not in good health and was suffering from pulmonary tuberculosis at the time that said first premium was paid. That this defendam never knew that said Oscar Mosher was not in good health and was suffering from pulmonary tuberculosis at any time until on or about May 19th, 1923, and until after the time of the execution of said extension agreement for payment of premium as alleged in paragraph "VII" of the complaint herein.

XXXXVI

That this defendant knew nothing of the falsity of said representations or any of same until on or about said 19th day of May, 1923. That this defendant knew nothing of the fraudulent conspiracy or of any of the fraudulent acts of said conspirators or of either or any of them, performed as hereinbefore alleged until on or about said 19th day of May, 1923.

XXXXVII

That on said discovery of said fraud, on the said 19th day of May, 1923, this defendant entered into an agreement with said insured Oscar Mosher, wherein and whereby said policy of insurance was in all things cancelled and rescinded

because of said fraudulent representations and because of said policy not having taken effect by reason of the first premium thereon not having been paid during the good health of said Mosher. That in and by the terms of said agreement it was conceded by said Mosher that false rep-
[fol. 22] resentations had been made by him, and that the first premium was not paid during the good health of said Mosher. That the consideration for said agreement was the payment by defendant to said insured of the sum of Three Hundred ($300.00) Dollars, and its promise to return the amount of premiums that it had been paid on said policy, together with seven (7%) per cent interest from the date of each payment, to the person having paid such premium. That in and by the terms of said agreement of rescission and cancellation said policy was rescinded and cancelled as of the date of its issue.

XXXXVIII

That in pursuance of said agreement, all of said premiums so paid together with interest thereon from the date of payment of each at seven (7%) per cent were tendered to the said Dazey State Bank, and that said Dazey State Bank refused and still refuses to accept such tender, but claims to be entitled to the full amount of the policy as hereinbefore alleged.

XXXXIX

That on or about the 1st day of June, 1923, this plaintiff was notified and informed by this defendant of said rescission and cancellation, and that plaintiff was at said time notified and informed by this defendant that said policy was never delivered during the good health of the insured, that the first premium was never paid thereon during the good health of the insured, and that the same never went into force and effect. That on the said first day of June, 1923, this defendant further informed and notified the plaintiff that said Dazey State Bank claimed to be entitled to all of the proceeds of said policy, and claimed to be entitled *titlet* to all of the proceeds by virtue of its said assignment from said insured. That on said first day of June, 1923, this defendant made a demand upon

plaintiff for the return of said policy of insurance, for the purpose of cancellation. That on said first day of June, 1923, this defendant offered to pay the said premiums, which totaled $1,102.20 and offered further to pay the interest on each of said premiums from the time it was paid, to either of the parties who might be entitled thereto, and offered to bring the said amount into court, and have it there determined which of said assignees, viz: Dazey State Bank or plaintiff, was entitled thereto, and to abide by the decision of the Court in the premises.

[fol. 23] Wherefore, Defendant prays that plaintiff take nothing by this action, and that it be given judgment for its costs and disbursements herein.

O'Malley & O'Malley, Attorneys for Defendant, 900-905 Guardian Life Bldg., St. Paul, Minnesota. John B. Hanten, Of Counsel, Watertown, South Dakota.

Duly sworn to by Raymond G. O'Malley. Jurat omitted in printing.

(Endorsed:) Service of within Amended Answer is hereby admitted at Minneapolis, Minnesota, this 18th day of January, A. D. 1924.

Ueland & Ueland, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 24] In United States District Court

[Title omitted]

Amended Complaint—Filed Jan. 30, 1924

Plaintiff complains of defendant and alleges:

1. That plaintiff during all the times herein mentioned was, and still is, a national banking association under the laws of the United States having its banking offices at Minneapolis, Minnesota.

2. That defendant during all the times herein mentioned was, and still is, a corporation created and existing under

the laws of the State of South Dakota, and authorized and licensed to do business as an insurance company in the State of Minnesota, and in the State of North Dakota; that as a condition for doing business in the State of North Dakota under said license, defendant, as to all policies of life insurance written, issued or delivered in said State, was required to comply with the provisions of the laws of said State as to the terms and conditions of such policies.

3. That on May 14, 1920, defendant in consideration of a premium of $108.50, and of the sum of $394.20 to be paid to it during the life of one Oscar Mosher, on November 28, 1920, and annually on the 28th day of November thereafter, made and delivered to said Oscar Mosher its policy of insurance Number 18260 and thereby insured the life of said Oscar Mosher in the sum of $10,000.00 payable to the estate of said Oscar Mosher immediately upon receipt of due proof of the death of said Oscar Mosher by defendant. That except certain provisions in said policy giving the assured the privilege of borrowing money thereon, to have it reinstated in case any annual premium should not be paid when due, and given the policy a surrender value before the death of the assured, said policy, including all writings attached thereto and in any way made part thereof, was in the words and figures of Exhibit "A" hereto attached, which is made part of this complaint.

4. That thereafter on or about October 10, 1921, said Oscar Mosher for valuable consideration, by an assignment in writing attached to said policy, duly assigned said policy [fol. 25] to one J. E. Jacobson of Dazey, North Dakota, together with all the moneys assured or to become due by or under said policy and the full benefit thereof; that a duplicate of said assignment was, on October 18, 1921, duly filed at the Home Office of defendant and the receipt thereof was duly acknowledged by defendant. A true and correct copy of said assignment is marked Exhibit "B" and attached hereto and made a part hereof.

5. That thereafter on or about February 26, 1923, said Oscar Mosher and said J. E. Jacobson, for valuable consideration, by an assignment in writing attached to said policy duly assigned said policy to plaintiff, together with all the moneys assured or to become due by or under said

policy and the full benefit thereof; that a duplicate of said assignment was, on March 2, 1923, duly filed at the Home Office of defendant and the receipt thereof was duly acknowledged by defendant. A true and correct copy of said assignment is marked Exhibit "C" and attached hereto and made a part hereof.

6. That said policy of insurance set forth in Exhibit "A" hereto was made and delivered in the State of North Dakota, and that said Oscar Mosher was a resident of said State.

7. That at all the times herein mentioned it was the law of the State of North Dakota, as provided by the statutes of said State, that no policy of life insurance should be issued or delivered in that state and no policy of life insurance of a life insurance company organized under the laws of that State should be issued, unless authorized by statutory provision. N. D. Comp. Laws '13, #6634.

8. That at all the times herein mentioned it was likewise the law of the State of North Dakota, as provided by Section 6635 of the North Dakota Compiled Laws of 1913, that life insurance policies might be issued and delivered in North Dakota in certain standard forms; that said policy of insurance set forth in Exhibit "A" hereto was not in accordance with the provisions of any of the Standard forms set forth in said Section 6635.

9. That at all the times herein mentioned it was likewise the law of the State of North Dakota, as provided by the statutes of said State, that no policy of life insurance in form other than as provided in said Section 6635 should be issued in said State unless the same contained "a provision that the policy shall constitute the entire contract between [fol. 26] the parties and shall be incontestable after two years from its date, except for non-payment of premiums and except for violations of the conditions of the policy relating to naval and military services in time of war." N. D. Comp. Laws 1913 #6635 c.

10. That at all the times herein mentioned it was likewise the law of the State of North Dakota, as provided by the statutes of said State, that no policy of life insurance in form other than as provided in said Section 6635 should be issued in said State unless the same contained "a provision

that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties and that no such such statement shall void the policy unless it is contained in a written application and a copy of such application shall be endorsed upon or attached to the policy when issued." N. D. Comp. Laws 1913 #6635 c.

11. That at all the times herein mentioned it was likewise the law of the State of North Dakota, as provided by the statutes of said State, that "every policy of life insurance issued or delivered within this State on or after the first day of January 1908, by any life insurance corporation doing business within the State shall contain the entire contract between the parties." N. D. Comp. Laws 1913 #6636.

12. That at the time herein mentioned it was likewise the law of the State of North Dakota, as provided by the statutes of said State, that "every express warranty made at or before the execution of a policy must be contained in the policy itself, or in another instrument signed by the insured and referred to in the policy as making a part of it." N. D. Comp. Laws 1913 #6521.

13. That said Oscar Mosher died on September 10, 1923, while said policy was in full force and effect at his residence on a farm northeast of Dazey, North Dakota.

14. That up to the time of the death of said Oscar Mosher all premiums which accrued on said policy were paid on or before the times agreed upon by and between said Oscar Mosher and defendant; that the time for the payment of the premium of $394.20 originally due on said policy on November 28, 1922, was, by written agreement, entered into between said Oscar Mosher and defendant on November 27, 1922, and in consideration of the sum of $118.26 and the further sum of $16.56 as interest paid to defendant, ex- [fol. 27] tended for one year; that said agreement provided that in the event of said Oscar Mosher's death within said period of extension, the sum insured should be paid subject to deduction of said premium of $394.20 originally due on November 28, 1922 and that said sum of $118.26 should in that event be repaid.

15. That on October 12, 1923, plaintiff duly gave defendant notice and proof of death of said Oscar Mosher, as provided in said policy.

16. That both said Oscar Mosher and plaintiff have duly performed all conditions required in said policy to be by them respectively performed.

17. That on October 12, 1923, and after plaintiff had given defendant notice and proof of death as aforesaid, plaintiff demanded payment of the amount due on said policy, and under said extension agreement, to-wit: the sum of $9,724.06, from defendant, but no part thereof has been paid.

Wherefore plaintiff demands judgment for $9,724.06, with interest thereon at the rate of 6 per cent per annum, together with plaintiff's costs and disbursements.

Ueland & Ueland, Plaintiff's Attorneys, 401 New York Life Building, Minneapolis, Minnesota.

EXHIBIT "A" TO AMENDED COMPLAINT

Number 18260. Dollars, 10,000.

Dakota Life Insurance Company, Watertown, South Dakota, by this policy of insurance agrees to pay, amount of insurance, ten thousand dollars, at the home office of the Company in Watertown, South Dakota, to beneficiary, the executors, administrators, or assigns of the insured, if then living (with—the right on the part of the insured to change the beneficiary), immediately upon receipt of due proof of the death, during the continuance of this policy, of the [fol. 28] insured, Oscar Mosher.

This Policy is issued in consideration of the answers made in the application herefor, and the statements made therein, all of which are made a part hereof, and copied hereon, and of the premium of three hundred ninety four and 20/100 dollars payable in advance at the Home Office of the Company, or as provided under paragraph number three on the second page hereof, in exchange for the Company's receipt on or before the Twenty Eighth day of November in every year during the continuance of this Policy, until the death of the Insured, subject to the privileges and provisions on the subsequent pages hereof, which are hereby

made a part of this contract as much as if receipted over the signatures hereto affixed.

In witness whereof, the said Dakota Life Insurance Company, at its home office, in the city of Watertown, South Dakota, has caused this Policy to be signed by its president and secretary this fourteenth day of May, one thousand nine hundred and twenty.

John B. Hanten, President; F. L. Bramble, Secretary.

Attest: D. J. Ross. (Corporation Seal.)

Ordinary Life Policy, Non-participating. Premiums payable for Life.

General Conditions

1. Modifications, etc.—No condition, provision or privilege of this Policy can be waived or modified in any respect except by the written agreement of the Company, in compliance with the laws of the state in which the Policy is issued, signed by the President, Vice-President, Secretary or Actuary, whose authority will not be delegated. No agent has the power in behalf of the Company to make or modify this or any other contract of insurance, to extend the time for payment of premiums, to waive any forfeiture, or to bind the Company by making any promise, or making or receiving any representation or information.

[fol. 29] 2. Indebtedness.—Any indebtedness to the Company on account of this Policy will be deducted from any amount payable hereon in any settlement hereunder.

3. Payment of Premiums.—This Policy is based upon the payment of premiums annually in advance, but if premiums be made payable in quarterly or semi-annual installments, any future installments of the premium for the current policy year remaining unpaid at the maturity of the Policy shall be considered an indebtedness to the Company on account of this Policy. Premiums are payable at the Home Office of the Company, but may be paid to an agent of the Company on or before the dates when due, in exchange for official receipts signed by the President or the Secretary and countersigned by an authorized agent of the Company. If any premium be not paid when due, this Policy shall be void and all premiums forfeited to the Company, except as herein provided.

4. War Clause.—Military and Naval service, or any service allied thereto or connected therewith, outside the boundaries of continental United States or its possessions in the Western Hemisphere, and therein if invaded, in time of war, are risks not assumed under this Policy and where death occurs under these conditions the liability of the Company hereunder shall be limited to the reserve of the Policy at the time of death, and if the Insured shall become totally disabled while in the above service the Company shall not be liable for the Total Disability Benefits as provided in this Policy, unless a permit for such service shall have been applied for in writing and granted by the Company, and an extra premium, as determined by the Company, paid therefor.

5. Assignment.—No assignment hereof shall be binding upon the Company unless made by an instrument in writing endorsed upon this Policy or attached hereto, and the Company shall not be deemed to have knowledge of such an assignment unless the original or the duplicate thereof is filed at the Home Office of the Company and its receipt duly acknowledged. The Company will not assume the responsibility for the validity of an assignment.

6. Suicide.—In the event of the death of the Insured, within one year from the date hereof, by his or her own hand, whether sane or insane, the liability of the Company shall be the amount of the premium paid.

7. Change of Beneficiary.—When the right of revocation has been reserved, or in case of the death of any beneficiary [fol. 30] under either a revocable or irrevocable designation, the Insured, subject to an existing assignment of the Policy, may designate a new beneficiary with or without reserving right of revocation by filing written notice thereof at the Home Office of the Company, accompanied by the Policy for suitable endorsement thereon. If any beneficiary shall die before the Insured, and the Insured shall not have designated a new beneficiary, the interest of such beneficiary shall be payable to the Insured, his executors, administrators or assigns.

8. Incontestability.—This Policy constitutes the entire contract between the parties and shall be incontestable from

its date except for non-payment of premiums and except as otherwise provided in this Policy. All statements made by the Insured shall in the absence of fraud be deemed representations and not warranties and no such statement shall avoid this Policy unless it is contained in a written application and a copy of such application shall be endorsed upon or attached to this Policy when issued. If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

* * * * * * *

The first year's insurance under this Policy is Term Insurance.

Copy of the Application upon Which this Policy is Issued and Which is Made a Part of the Policy Contract

1.
A. My full name is Oscar Mosher.

C. Address Dazey, North Dakota

B. All notices are to be sent to

2. (State or Country) Month, Day, Year

A. Where born—	B. When born,	(Nearest Birthday)	D. I am married	Race or Nationality
Montcalm, Michigan	August 5th, 1870	C. Age 50		E. American

3. My occupation and duties thereof are fully described as follows: Farming.

4. I have no life insurance— except as herein stated.

Company	Amount	Company	Amount
M. W. A.	$2,000		

5. No application ever made by me for life insurance has been declined, nor has any contract ever been issued other than as applied for— except as herein stated.

[fol. 31]

No.

6.
A. Kind of Policy Ordinary
(Use such terms as Ordinary Life. 20-Payment Life, 20-Year Endowment, Etc.

B. Amount of Insurance $10,000.00

C. Amount of Premium $108.50 8. Term 394.20

D. The premium is to be paid Annually on Nov. 28th each year. (Annually, Semi-Annually or Quarterly)

7.
At my death the Insurance shall be payable to My Estate
(With privilege to change on my written request.)

Name in full	Age	Relationship	Residence

I Hereby Agree: That this application and the policy hereby applied for, taken together, shall constitute the entire contract between the parties hereto, and I hereby declare that all the answers and statements made above and those that shall be made to the Medical Examiner are true, and that this contract shall not take effect until the first premium has been paid during my good health. To have the required medical examination made within thirty days by a physician appointed by the Company, or at such other time thereafter as may be fixed in writing.

Dated at Dazey, N. D. this 14th day of May, 1920.

Oscar Mosher, Applicant.
(Sign the name in full.)

Witnessed by J. E. Jacobson, Agent. P. L. Higgins.

Received of Oscar Mosher $108.50, Preliminary Term, to carry this Policy, #18260, from May 14, 1920 to November 28, 1920.

Raymond F. Reitter, Actuary.

EXHIBIT "B" TO AMENDED COMPLAINT

Assignment of Policy of Life Insurance

This Indenture, made this 10th day of October A. D. 1921 between Oscar Mosher, hereinafter called party of the first part, and Dazey State Bank, Dazey, N. Dak., hereinafter called the beneficiary, and J. E. Jacobson of Dazey, North Dakota hereinafter called party of the second part,

[fol. 32] Witnesseth: In consideration of One Dollar and other valuable consideration to the said party of the first part and the said beneficiary paid by the said party of the second part, the receipt whereof is hereby acknowledged, the said party of the first part and the beneficiary do hereby assign unto the said party of the second part, his executors, administrators and assigns, all that policy of insurance on the life of the said party of the first part, granted by the Dakota Life Insurance Company of Watertown, S. D., Numbered 18260 for the sum of Ten Thousand and 00/100 Dollars, payable in the event of death to the said

beneficiary, his executors, administrators and assigns and all the moneys assured or to become due by or under the said policy and the full benefit thereof; with power to give an effectual discharge for all moneys to become payable thereunder; to have and to hold the same unto the said party of the second part, his executors, administrators and assigns.

And the said party of the first part does hereby covenant with the said party of the second part that he, the said first party, will not do or knowingly suffer anything whereby the said policy may be rendered void or voidable, or the said party of the second part may be prevented from receiving the said sum of $10,000.00 or any part thereof; and that the said party of the first part will promptly and punctually pay all premiums and other charges that may become due or payable under said policy. In the event that such premiums or other charges shall not be paid promptly and punctually, then the party of the second part may pay the same and the amounts so paid shall be added to and become a part of the debt hereby secured, or the party of the second part may exercise or elect any of the options granted in said policy.

This assignment is given to secure the payment to the said party of the second part of the sum of as per designated amount of Dollars, according to the tenor and conditions of several promissory note.

In Witness Whereof, the said party of the first part and the beneficiary have hereunto set their hands and seals this 10th day of October A. D. 1921.

Oscar Mosher. Dazey State Bank, by H. L. Jacobson.

In witness Whereof: Geo. F. Sheldon. A. J. McInnen.

[fol. 33] State of North Dakota,
County of Barnes, ss:

On this 10th day of October A. D. 1921, before me a Notary Public in and for said County and State, personally appeared Oscar Mosher and H. L. Jacobson, Cashier of Dazey State Bank known to me to be the persons who are described in and who executed the within and foregoing in-

strument and duly severally acknowledged to me that they executed the same.

A. J. McInnen, Notary Public, Barnes County, N. Dak. (Notarial Seal.)

My Commission Expires Nov. 29, 1924.

The foregoing assignment is hereby approved, subject, however, to all the terms and conditions set forth in said Policy. Dated the 18th day of October 1921.

Dakota Life Insurance Company, by J. J. Bell, Actuary.

EXHIBIT "C" TO AMENDED COMPLAINT

Assignment of Policy of Life Insurance

This Indenture, made this 26th day of February A. D. 1923 between Oscar Mosher, hereinafter cal-ed party of the first part, and J. E. Jacobson, hereinafter called the beneficiary, and Midland National Bank of Minneapolis, Minn. hereinafter called party of the second part.

Witnesseth: In consideration of Ten Thousand and 00/100 Dollars to the said party of the first part and the said beneficiary paid by the said party of the second part, the receipt whereof is hereby acknowledged, the said party of the first part and the beneficiary do hereby assign unto the said party of the second part, his executors, administrators and assigns, all that policy of insurance on the life of the said party of the first part, granted by the Dakota Life Insurance Company of Watertown, S. D., Numbered 18260 for the sum of Ten Thousand and 00/100 Dollars, payable in [fol. 34] the event of death to the said beneficiary, Midland National Bank and all the moneys assured or to become due by or under the said policy and the full benefit thereof; with power to give an effectual discharge for all moneys to become payable thereunder; to have and to hold the same unto the said party of the second part, his executors, administrators and assigns.

And the said party of the first part does hereby covenant with the said party of the second part that he, the said first party, will not do or knowingly suffer anything whereby

the said policy may be rendered void or voidable, or the said part- of the second part may be prevented from receiving the said sum of $10,000.00 or any part thereof; and that the said party of the first part will promptly and punctually pay all premiums and other charges that may become due or payable under said policy. In the event that such premiums or other charges shall not be paid promptly and punctually, then the party of the second part may pay the same and the amounts so paid shall be added to and become a part of the debt hereby secured, or the party of the second part may exercise or elect any of the options granted in said policy.

This assignment is given to secure the payment to the said party of the second part of the sum of Ten Thousand and 00/100 Dollars, according to the tenor and conditions of two promissory note-.

In Witness Whereof, the said party of the first part and the beneficiary have hereunto set their hands and seals this 26th day of February A. D. 1923.

Oscar Mosher. J. E. Jacobson.

In Witness Whereof: F. G. Haag. R. C. Jacobson.

STATE OF NORTH DAKOTA,
County of Barnes, ss:

On this 27th day of February A. D. 1923, before me, a Notary Public in and for said County and State personally appeared Oscar Mosher and J. E. Jacobson known to me to be the persons who are described in and who executed the within and foregoing instrument and duly severally acknowledged to me that they executed the same.

Rudolph C. Jacobson, Notary Public, Barnes County, N. Dak. (Notarial Seal.)

My commission expires Sept. 30, 1928.

[fol. 35] The foregoing assignment is hereby approved, subject, however, to all the terms and conditions set forth in said policy. Dated the 2nd day of March, 1923.

Dakota Life Insurance Company, by J. J. Bell, Actuary.

Duly sworn to by Edgar L. Mattson. Jurat omitted in printing.

(Endorsed:) Due and personal service of within is hereby admitted at St. Paul, Jan. 28, 1924. O'Malley & O'Malley, Defendant's Attys.

[File endorsement omitted.]

UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO AMENDED COMPLAINT—Filed February 18, 1924; in U. S. C. C. A. December 7, 1926

Now comes defendant and answers the amended complaint of plaintiff herein as follows:

I

Defendant denies each and every allegation, matter and thing contained in Paragraphs numbered 3, 4, 5, 6, 8, 13 and [fol. 36] 16, save and except such as are hereinafter admitted by the allegations hereof.

Further answering, the defendant alleges:

II

That on May 14th, 1920, one J. E. Jacobson was, and for some time prior thereto had been, an agent of this defendant engaged in soliciting applications for life insurance and writing policies of life insurance for this defendant at Dazey, North Dakota, and in the territory directly tributary thereto.

III

That on the said 14th day of May, 1920, one Paul M. Kellogg was, and for a long time prior thereto had been, a physician and surgeon duly licensed to carry on and practice his profession as such in the State of North Dakota, and that during all of said times he was residing at Rogers, North Dakota.

IV

That said Oscar Mosher on said 14th day of May, 1920, was, and for a long time prior thereto had been, afflicted with, and suffering from, a disease and ailment of the lungs known as pulmonary tuberculosis. That said pulmonary tuberculosis had reached an advanced stage in said Mosher, and that on said 14th day of May, 1920, he was in imminent danger of death therefrom, and there was no hope or chance of his recovery therefrom.

V

That said Mosher on said 14th day of May, 1920, and for a long time prior thereto, was not, and had not been, in good physical and bodily health and condition by reason of said disease, and that he was not, and had not been at said time, a fit or safe subject for life insurance.

VI

That all of these said facts relative to the health and physical and bodily condition of said Mosher were on said 14th day of May, 1920, and for a long time prior thereto had been, well known to said Mosher, to said Kellogg and to said Jacobson.

VII

That on said 14th day of May, 1920, said J. E. Jacobson was, and for a long time prior thereto had been, the president of the Dazey State Bank, a banking corporation, cre-
[fol. 37] ated, organized and existing under the laws of the State of North Dakota, and engaged in carrying on a general banking business at Dazey in said State.

VIII

That on and prior to said 14th day of May, 1920, said Mosher was indebted to said Dazey State Bank in a substantial sum of money, the exact amount whereof is unknown to this defendant.

IX

That at the times hereinafter mentioned said Mosher was unable to perform any work or labor on account of his said physical condition and was unable to pay his said indebtedness to said bank and was unable to pay anything on account thereof.

X

That shortly prior to said 14th day of May, 1920, said Dazey State Bank, said Jacobson, said Mosher and said Kellogg, well knowing of the facts hereinbefore alleged, entered into a conspiracy to defraud this defendant by inducing and causing it to issue a policy of life insurance on the life of said Mosher in the sum of Ten Thousand ($10,000.00) Dollars, payable to the estate of said Mosher or his assigns, and to procure an assignment of said policy immediately after its issue to said Dazey State Bank as security for the said indebtedness, all in anticipation of the early death of the said Mosher.

XI

That for the purpose of carrying out said conspiracy, it was agreed among said conspirators that said Jacobson acting on behalf of defendant would engage said Kellogg to make a physical examination of said Mosher; that said Kellogg would falsely represent and certify to said defendant that he had determined as a result of his examination that said Mosher was a fit and proper insurance risk, and that he would further certify and represent to defendant that all false answers to questions touching on his health made by said Mosher were true; that said Mosher would give false answers to all questions asked him relating to his health and desirability as an insurance risk; that said Dazey State Bank would pay all premiums required by defendant to be

paid as a consideration for writing said policy of insurance; that said Jacobson would accept on behalf of defendant said application for said insurance and falsely represent to defendant that said Mosher was a good insurance risk; that [fol. 38] after said policy was issued, said Mosher would assign the same to said Dazey State Bank; and that said Mosher, said Jacobson and said Kellogg would fraudulently conceal from defendant the fact that said Mosher was suffering from pulmonary tuberculosis.

XII

That in furtherance of said conspiracy, said Oscar Mosher on the 14th day of May, 1920, signed a written application for life insurance in this defendant for the sum of Ten Thousand ($10,000.00) Dollars. That a true and correct copy thereof is attached to plaintiff's amended complaint herein, and made a part thereof, as part of the Exhibit "A."

XIII

That in furtherance of said conspiracy said Jacobson procured said Kellogg to make a medical examination of said Mosher. That this defendant required a medical examination to be made of each and every person applying to it for life insurance, which fact said Jacobson well knew. That said Kellogg was not the regular medical examiner in said vicinity for this defendant, which fact was also well known to said Jacobson. That as part of such medical examinations, blanks were furnished by defendant to its agents, containing lists of questions to be put to applicants by said medical examiner, and by said applicant answered. That it was the duty of such medical examiner to record such answers as were made to such questions by said applicants.

XIV

That in furtherance of said conspiracy said Mosher submitted himself for physical examination to said Kellogg on the 14th day of May, 1920. That said Kellogg as part of said Medical examination asked said Mosher if he had ever suffered from any ailment or disease of the lungs. That in

response to this question said Mosher answered "No." That said Kellogg further asked said Mosher this question:

"Has any person in your family or your immediate household ever suffered or died from consumption."

That said Mosher answered this question "No."

And that said Kellogg further asked said Mosher this question:

"Have you ever raised or spat blood?"

[fol. 39] And that said Mosher answered this question "No." That said Kellogg wrote down and recorded each of said answers so made by said Mosher to said questions in said blank furnished him for said purpose.

XV

That each and all of said statements and representations so made by said Mosher in the form of said answers to said questions were false and untrue in (a). That he was at the time that he made same, and for a long time prior thereto had been, suffering from a disease and ailment of the lungs known as pulmonary tuberculosis, and was at said time in the last stages thereof; (b) In that a person, viz: one Pearl Labdury, had died from consumption on or about November 23rd, 1919, while a member of his, said Mosher's, family, and in his immediate household, and in that she had suffered from said disease for a period of nine years prior to her death, and during all of that time had been such member of his family and living in his immediate household, and (c) In that he had at numerous times and on numerous occasions raised and spat blood.

XVI

That said Mosher at the time he made said representations well knew that the same were false and untrue as aforesaid; that each and all thereof were so made by him in furtherance of said conspiracy, for the purpose of defrauding this defendant, and causing it to issue its policy of insurance on his life in the sum of Ten Thousand ($10,000.00) Dollars. That each and all of said representations

were material and materially affected the risk assumed by this defendant in writing its policy of insurance.

XVII

That in furtherance of said conspiracy, said Kellogg wrote down said answers so made by said Mosher with full knowledge of their falsity. That in furtherance of said conspiracy said Kellogg represented and stated to this defendant that he had examined the lungs of said Mosher on the said 14th day of May, 1920, and that he found no evidence of past or present disease thereof. That on said 14th day of May, 1920, said Kellogg further stated and represented to this defendant that said representations and statements so made by said Mosher in the form of answers to questions as hereinbefore alleged, were all full, complete and true as far as he knew.

[fol. 39a]

XVIII

That the said statements and representations so made by said Kellogg were false and untrue, in that he did find evidence of both past and present disease in the lungs of said Oscar Mosher, viz: Pulmonary tuberculosis, and in that he well knew when he made said statement and representation that said Mosher was suffering from tuberculosis of the lungs in its last stages and in that he well knew at the time he made said representations and statements that said Mosher had frequently raised and spat blood and in that he well knew that said Ladbury had died a member of said Mosher's family and in his immediate household, from consumption, and had suffered from, and been afflicted with, the same for over nine years while such member of his family and in his immediate household.

XIX

That said Kellogg well knew that each and all of the said representations so made by him were in all things false and untrue, and he so made each and all of them in furtherance of said conspiracy, for the purpose of defrauding this defendant and inducing it to insure the said life of said Mosher in the said sum of Ten Thousand ($10,000)

Dollars; that each and all of the statements and representations so made to this defendant by said Kellogg were material.

XX

That in furtherance of said conspiracy said Jacobson accepted the application of said Mosher on behalf of this defendant and fraudulently omitted to disclose to this defendant, although it was his duty as agent to do so, the facts as to the said condition of said Mosher's physical and bodily health, as hereinbefore alleged, and fraudulently omitted and failed to disclose to this defendant the fact that said Mosher at the time he signed said application was in the final stages of said pulmonary tuberculosis, which fact said Jacobson well knew as hereinbefore alleged. And that in furtherance of said conspiracy said Jacobson, said Mosher and said Kellogg fraudulently concealed, omitted and failed to disclose to this defendant the true fact as to said Mosher's physical condition, viz: that he was in the final stages of pulmonary tuberculosis.

XXI

That this defendant believed each and all of said representations so made by said Mosher, Jacobson and Kel- [fol. 39b] logg to be true, and in reliance upon the truth thereof, and not otherwise, was induced to, and in fact did, issue its policy of insurance on the life of said Oscar Mosher in the sum of Ten Thousand ($10,000.00) Dollars, on May 14th, 1920.

XXII

That a premium of One Hundred Eight and 50/100ths ($108.50) Dollars was paid on the issuance of the policy and further premiums in the sum of Three Hundred Ninety-four and 20/100ths ($394.20) Dollars were required to be paid on November 28th, 1920, and each 28th of November annually thereafter.

XXIII

That in furtherance of said conspiracy, said Dazey State Bank paid said premium of One Hundred Eight & 50/100ths ($108.50) Dollars, and each and all other pre-

miums that were thereafter paid to this defendant on account of said policy, and that no premium or premiums thereon were ever paid by any other person or persons.

XXIV

That upon its issuance said policy was transmitted by this defendant to said J. E. Jacobson at Dazey, North Dakota, for the purpose of delivery by him to said Oscar Mosher when and while he, said Mosher, was in good health, on payment of the first premium by him.

XXV

That at the time of the payment of said first premium by said Dazey State Bank, said Mosher was not in good health, but was still suffering from said pulmonary tuberculosis and in the last stages thereof, and that said policy of insurance was never delivered to said Mosher during his good health, or otherwise, or at any other time.

XXVI

That said Mosher continued not to be in good health and continued to suffer from said tuberculosis, and in said last stages thereof, until the 10th day of September, 1923, at which said time he died at his residence on a farm northeast of Dazey, North Dakota. That the cause of death of said Oscar Mosher was said pulmonary tuberculosis.

XXVII

That had this defendant known at the time of issuing its said policy that said statements and representations, or [fol. 39c] any thereof, were false anl untrue, it would not have issued its said policy of insurance. That had this defendant known of the said condition of said Mosher it would not have issued said policy of insurance. That had this defendant known of the concealment by said Jacobson, said Mosher and said Kellogg of the fact that said Mosher was suffering from pulmonary tuberculosis as aforesaid, it would not have issued said policy.

XXVIII

That by reason of the facts hereinbefore alleged, and all of the same, said policy was void in its inception and was not, and never has been, in force and effect.

XXIX

That in furtherance of said conspiracy said Mosher on the 17th day of July, 1920, executed an instrument in writing whereby he purported to assign said policy of insurance to the said Dazey State Bank of Dazey, North Dakota. That at this said time this said policy of insurance was in the possession of the Dazey State Bank, and that it had so been ever since its receipt by said J. E. Jacobson. That, as hereinbefore alleged, during all times here in question, said J. E. Jacobson was the president of said bank, and that his son H. L. Jacobson was cashier thereof, and that said bank and all of its affairs were under the direction, management, control and domination of said J. E. Jacobson.

XXX

That said written instrument recites that the assignment was made in consideration of One Dollar and other valuable consideration, and that it also contains the following recital:

"This assignment is given to secure the payment to the said party of the second part of the sum of as per designated amount of — Dollars according to the tenor and conditions of several promissory notes."

XXXI

That on the 10th day of October, 1921, an instrument in writing was executed purporting to assign said policy of insurance from said Oscar Mosher and Dazey State Bank to said J. E. Jacobson. That a true and correct copy thereof is attached to the plaintiff's amended complaint herein and marked Exhibit "B." That at the time that [fol. 39d] said Oscar Mosher so signed said instrument, he was in great physical and mental anguish and distress from the ravages of said disease, and was under the com-

plete control of said J. E. Jacobson. That to induce said Mosher to sign said assignment, said J. E. Jacobson represented to him that the debt said Mosher was owing to said bank had been assigned to him, Jacobson, which representation was entirely false and untrue, but that the same was believed by said Mosher to be true, and that he so signed said instrument in that belief. That said Dazey State Bank never authorized said H. L. Jacobson to sign or execute said assignment on its behalf, and that it never authorized any other person or persons to execute or sign said instrument on its behalf. That said purported assignment was not a bona fide transaction, and was a fraud on said bank, perpetrated by said J. E. Jacobson and his said son H. L. Jacobson. That said policy of insurance was stolen from the said bank by said J. E. Jacobson and said purported assignment procured by him for the purpose of divesting said bank of its security in the form of said policy, and thereby defrauding it, its creditors and stockholders, and appropriating the same, and any proceeds that might arise therefrom to his own use.

XXXII

That said Mosher was never indebted at any time to said J. E. Jacobson, and that said bank was not indebted to said J. E. Jacobson, and that there was not any consideration whatsoever for said purported assignment, and that said indebtedness owing from said Mosher to said Bank was never assigned by the said bank to said Jacobson.

XXXIII

That thereafter and on the 26th day of February, 1923, said Jacobson procured said Mosher to join with him in executing a purported assignment of said policy to plaintiff, a true and correct copy of which is attached to plaintiff's amended complaint herein and marked Exhibit "C."

XXXIV

That said Mosher was never indebted to the plaintiff and no debt owing from him to the said Dazey State Bank was ever assigned to plaintiff. That plaintiff never acquired any interest in said policy, or any right or interest in or to the

proceeds thereof by virtue of the said purported assignment.

[fol. 39e] XXXV

That there was no consideration for said purported assignment to plaintiff and that the same was invalid and in fraud of the rights of the Dazey State Bank of Dazey, North Dakota.

XXXVI

That this defendant received notice of each of said assignments, and that it acknowledged such receipt and signified its approval thereof, but that it did so without knowledge of the facts hereinbefore alleged. That if it had known at the time of the existence of the state of things hereinbefore set forth, it would have refused to approve any of said assignments. That its said approval to each assignment was made subject to all of the terms and conditions of said policy.

XXXVII

That said assignment from said Mosher and said Jacobson was given to plaintiff as security for a loan made by it to said Jacobson.

XXXVIII

That at the time that said assignment was so made to plaintiff, both Jacobson and plaintiff represented to said Mosher that the said indebtedness of said Mosher to said Dazey State Bank had been assigned by said bank to said Jacobson and by said Jacobson to this plaintiff, which representation was in all things false and untrue, in that said indebtedness had not been assigned by said bank to said Jacobson and had not been assigned by said Jacobson to this plaintiff; that said representation was so made with knowledge of its falsity for the purpose of inducing said Mosher to make said assignment, and he believing the same to be true, was thereby induced to, and in fact did, join with said Jacobson in said assignment.

XXXIX

That at the time that this defendant approved said assignment to plaintiff, it had no notice of the facts alleged in

the next preceding paragraph hereof, and that it gave its approval to said assignment in the belief that said indebtedness of said Mosher to said bank had been assigned by said Bank — Jacobson and by Jacobson to plaintiff.

XL

That if it had known that said indebtedness had not been so asigned by said bank to said Jacobson, and by said [fol. 39f] Jacobson to plaintiff, it would not have given its approval of said assignment. That if it had known that said assignment to plaintiff was given merely as collateral security for a debt of Jacobson to plaintiff, and had it known that this plaintiff had no insurable interest in the life of said Mosher, it would not have given its approval of said assignment.

XLI

That this defendant was not informed and did not know of the falsity of any of said representations, and was not informed and did not know of the fraudulent conspiracy against it; nor of the true facts as to said assignments or any of them at the time that it received and accepted any of the premiums paid on account of said policy of insurance, and was not informed and did not know the truth relative to any of said matters at the time that it executed the extension agreement alleged in paragraph "14" of the amended complaint herein.

XLII

That this defendant was not informed and did not know that Oscar Mosher was not in good health at the time that the first premium was paid on said policy and was not informed and did not know that said Oscar Mosher was suffering from pulmonary tuberculosis at the time the first premium was paid.

XLIII

That each and all of said premiums paid on account of said policy were received and accepted by this defendant without knowledge on its part, and in ignorance of the fact that said Oscar Mosher was not in good health and was suffering from pulmonary tuberculosis at the time that said

first premium was paid. That this defendant never knew that said Oscar Mosher was not in good health and was suffering from pulmonary tuberculosis at any time until on or about May 19th, 1923, and until after the time of the execution of said extension agreement for payment of premium as alleged in paragraph "14" of the amended complaint herein.

XLIV

That this defendant knew nothing of the falsity of said representations or any of same until on or about said 19th day of May, 1923. That this defendant knew nothing of the fraudulent conspiracy or of any of the fraudulent acts [fol. 39g] of said conspirators or of either or any of them, performed as hereinbefore alleged until on or about said 19th day of May, 1923.

XLV

That immediately upon the discovery of the falsity of said representations and the truth as to the physical condition of said Mosher, on or about the 19th day of May, 1923, this defendant promptly rescinded its said agreement to insure the life of said Oscar Mosher, if and when the policy was delivered to him and the first premium paid during his good health. That notice of such rescission was promptly served upon both of said persons claiming to be assignees, viz: The Dazey State Bank and plaintiff.

XLVI

That exhibit "A" attached to plaintiff's amended complaint herein is a true and correct copy of the said life insurance policy transmitted by mail from the home office of this defendant at Watertown, South Dakota, to said J. E. Jacobson at Dazey, North Dakota, except that certain provisions thereof are omitted therefrom.

XLVII

That during all times mentioned in plaintiff's amended complaint herein, said Oscar Mosher was a resident of the State of North Dakota.

XLVII-

That during all the times here in question, Chapter 77 of the Compiled Laws of North Dakota, 1913, entitled "Insurance in General" was, ever since has been and still is, the duly enacted law of North Dakota. That said chapter provides as follows:

"Article 5.—Concealment and Representation.

"Section 6480. Concealment defined. A neglect to communicate that which a party knows and ought to communicate is called a concealment."

"Sec. 6481. Rescission on account of. A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance.

"Sec. 6482. Mutual disclosures. Each party to a contract of insurance must communicate to the other in good faith all facts within his knowledge which are or which he [fol. 39h] believes to be material to the contract and which the other has not the means of ascertaining and as to which he makes no warranty.

"Sec. 6484. How materiality determined. Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due in forming his estimate of the disadvantages of the proposed contract or in making his inquiries.

"Sec. 6490. Form of representation. A representation may be oral or written.

"Sec. 6491. When may be made. A representation may be made at the same time with issuing the policy or before it.

"Sec. 6492. Rules of interpretation. The language of a representation is to be interpreted by the same rules as the language of contracts in general.

"Sec. 6494. Cannot qualify contract; may, implied warranty. A representation cannot be allowed to qualify an express provision in a contract of insurance; but it may qualify an implied warranty.

"Sec. 6498. When deemed false. A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations.

"Sec. 6499. Effect of falsity. If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation become false.

"Sec. 6500. How materiality determined. The materiality of a representation is determined by the same rule as the materiality of a concealment.

"Sec. 6501. When not material. No oral or written misrepresentation made in the negotiation of a contract or policy of insurance by the insured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk or loss.

[fol. 39i] "Sec. 6502. Modification. Rescission. The provisions of this article apply as well to a modification of a contract of insurance as to its original formation. Whenever a right to rescind a contract of insurance is given to the insured by any provision of this chapter such right may be exercised at any time previous to the commencement of an action on the contract.

"Article 8.—Premium

"Sec. 6532. Return when insurance voidable. A person insured is entitled to a return of the premium when the contract is voidable on account of the fraud or misrepresentation of the insurer or an account of facts of the existence of which the insured was ignorant without his fault; or when by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy."

Wherefore, Defendant prays that plaintiff take nothing by this action, and that it be given judgment for its costs and disbursements herein.

O'Malley & O'Malley Attorneys for Defendant, 900-905 Guardian Life Bldg., S. Paul, Minnesota. John B. Hanten, of Counsel, Watertown, South Dakota.

Duly sworn to by Raymond G. O'Malley. Jurat omitted in printing.

[fol. 39j] (Endorsed): Due service of within answer to amended Complaint is hereby admitted at Minneapolis, Minnesota, this 18th day of February, A. D. 1924.

Ueland & Ueland, Attorneys for Plaintiff.

[File endorsement omitted.]

Certificate to foregoing paper omitted in printing.

[fol. 40] Notice of Motion to Strike--Filed March 6, 1924

To Messrs. O'Malley and O'Malley, Attorneys for Defendant:

Take notice that in the above entitled action a motion will be made on the part of Plaintiff on Saturday, the 8th day of March, 1924, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

First to strike out Paragraph I of Defendant's Answer to the Amended Complaint of Plaintiff insofar as said paragraph denies the allegations in Paragraph 8 of said Amended Complaint, on the ground that such denial is sham.

Second to strike out all Paragraphs IV to VI inclusive, IX to XI inclusive XIII to XX inclusive XXV to XXVIII inclusive, XLII to XLV inclusive, and the words "in furtherance of said conspiracy" in Paragraphs XII and XXIX, and the words "when and while he, said Mosher was in good health, on payment of the first premium by him" in Paragraph XXIV; on the ground that all such parts of said pleading consist wholly of irrelevant and redundant matter.

Third to strike out the following parts of said Answer to the Amended Complaint: all of Paragraph XIII, XXIII, XXXII, XXXIV, XXXV, XXXVII to XLI inclusive, and

all that part of Paragraph XXXI following after the words "marked Exhibit 'B' " in the fifth line of said paragraph, and that part of Paragraph XXXVI consisting of the words "but that it did so without knowledge of the facts hereinbefore alleged. That if it had known at the time of [fol. 41] existence of the state of things hereinbefore set forth, it would have refused to approve any of said assignments"; on the ground that all of such parts consist wholly of irrelevant and redundant matter.

Said motion will be made upon all the files and proceedings in this action, and upon printed copies of the statute laws of North Dakota which plaintiff will offer in evidence in support of said motion.

Ueland & Ueland, Plaintiff's Attorneys, 401 New York Life Bldg., Minneapolis, Minnesota.

(Endorsed:)

Due and personal service of the within Notice of Motion is admitted this 29th day of February, 1924.

O'Malley & O'Malley, Defendant's Attorneys.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION TO STRIKE PORTIONS OF ANSWER

The above entitled action came regularly on for hearing upon a motion by the plaintiff to strike out portions of defendant's answer to the amended complaint as follows, to-wit:

First. To strike out Paragraph I of Defendant's answer to the amended complaint of plaintiff, insofar as said paragraph denies the allegations in Paragraph 8 of said amended complaint, on the ground that such denial is sham.

Second. To strike out all of paragraph IV to VI inclusive, IX to XI inclusive, XIII to XX inclusive, XXV to XXVIII inclusive, XLII to XLV inclusive, and the words "in furtherance of said conspiracy" in paragraphs XII and XXIX, and the words "when and while he, said Mosher was

in good health, on payment of the first premium by him," in paragraph XXIV; on the ground that all such parts of said pleading consist wholly of irrelevant and redundant matter.

Third. To strike out the following parts of said answer to the amended complaint; all of paragraphs VIII, XXIII, XXXII, XXXIV, XXXV, XXXVII to XLI inclusive, and all [fol. 42] that part of paragraph XXXI following after the words "marked Exhibit "B", in the fifth line of said paragraph and that part of paragraph XXXVI consisting of the words "but that it did so without knowledge of the facts hereinbefore alleged. That if it had known at the time of the existence of the state of things hereinbefore set forth, it would have refused to approve any of said assignments" on the ground that all of such parts consist wholly of irrelevant and redundant matter.

Messrs. Ueland and Ueland appeared in support of said motion to strike and Messrs. O'Malley & O'Malley and Messrs. Hanten & Hanten, in opposition thereto.

And the Court, having heard the arguments of counsel and duly considered the same, together with all of the files and records in said action, hereby

Orders that said motion be and the same is hereby granted and the parts of the answer above specified are hereby stricken out.

Wilbur F. Booth, Judge of the U. S. District [—].

IN UNITED STATES DISTRICT COURT

OPINION ON MOTION TO STRIKE—Filed October 16, 1924

This is an action on a life insurance policy. The motion to strike out paragraph one of defendant's answer to the amended complaint, insofar as said paragraph denies the allegations in paragraph VIII of said amended complaint, is based on the allegation that said part of said paragraph I of defendant's answer is sham.

Paragraph VIII of the amended complaint alleges that the policy in suit is not in accordance with standard forms for life insurance policies set forth in Section 6635 N. D. Comp. Laws 1913; this is denied in the first paragraph of defendant's answer.

A sham pleading is one that is false and the test to determine whether this portion of defendant's answer is false is a comparison between the policy in suit and the standard forms given in the section of the statute above cited. Without going into details, it is sufficient to say that such a comparison makes very clear the fact that the policy in suit is not in accordance with the standard forms.

[fol. 43] The portion of the answer above referred to is therefore false, and being false, is sham, and should therefore be stricken.

The portions of the answer specified in the second paragraph of the motion to strike consist of allegations setting forth fraud and conspiracy by the insured and by the local agent of defendant, and by the examining physician, in connection with the application for the policy and the procurement thereof. The ground of the motion to strike these portions of the answer is that they are irrelevant and immaterial.

The policy in suit is a North Dakota policy. This is conceded by the defendant. Being a North Dakota policy and not being in standard form, it is covered by the provisions of Section 6635c, North Dakota Comp. Laws 1913. That section, so far as material here, reads as follows:

Sec. 6635c. Provisions of Life Policies. No policy of life insurance in form other than as provided in section 6635 shall be issued in this state or be issued by a life insurance company organized under the laws of this state unless the same shall contain the following provisions: * * *

3. A provision that the policy shall constitute the entire contract between the parties and shall be incontestable after two years from its date, except for non-payment of premiums and except for violations of the conditions of the policy relating to naval and military service in time of war.

4. A provision that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties and that no such statement shall void the policy unless it is contained in a written application and a copy of such application shall be indorsed upon or attached to the policy when issued."

The policy in suit does not, however, contain all these provisions, nevertheless these provisions must be read into

the policy and considered as a part thereof, as fully as if they were contained in the printed policy, itself.

This result is provided by statute in some states.

See Aaberg vs. Minn. Association, 143 Minn. 354.

Williams vs. Insurance Co. 169 N. W. 609.

But the provisions of the statute in reference to what the policy should contain must be read into the policy, even [fol. 44] though there be no statutory requirement to this effect. Public policy requires this.

See Hollin vs. Essex Assoc. 88 N. J. Law 204.

With the provisions of Section 6635c read into the policy in suit, such policy becomes incontestable, after two years from its date, and the defense of fraud set up in the answer is not available and the paragraphs of the answer containing such allegations are irrelevant and immaterial.

The fraud in question, if it occurred at all, occurred in May, 1920, when the policy was written and delivered. No attempt on the part of the defendant to deny liability on the policy was made until May, 1923. The death of the insured occured in October, 1923.

That the incontestable clause covers the defense of fraud, is well settled; such a provision is held to be in the nature of a statute of limitation or repose.

As the parties may stipulate within what time an action may be brought, so they may stipulate as to the time within which defenses may be asserted.

Such provisions do not condone the fraud, but limit the insurer to a time within which it may assert the fraud as against the contract.

Mutual Life Ins. Co. vs. Hurni Co. 263 U. S. 167. N. Y. Life Ins. Co. vs. Baker, 83 Fed. 647, 651. Great Western Co. vs. Snavely, 206 Fed. 20. Arnold vs. Society, 228 Fed. 157, Wright vs. Mutual Assoc. 118 N. Y. 237. Webster vs. Insurance Co. 131 App. Div. 837. Metropolitan Ins. Co. vs. Peeler, 6 A. L. R. 441, and note pg. 452. Clement vs. Insurance Co. 42 L. R. A. 247. (Tenn.) Mass. Benefit Assoc. vs. Robinsin, 42 L. R. A. 261. Becker vs. Ill. Life Ins. Co. 198 N. W. 884.

Furthermore the policy contains the provision "the policy shall constitute the entire contract between the parties."

The alleged false and fraudulent representations set up in the answer are neither in the policy nor in the application attached, and therefore are not available under the provision above quoted.

Wheelock vs. Ins. Co. 115 Minn. 177.

N. Y. Life Ins. Co. vs. Hamburger, 174 Mich. 254.

[fol. 45] In the paragraphs of the answer sought to be stricken out, are allegations that the policy was to be delivered only on the payment of the first premium while the insured was in good health, and that the insured was not in good health when the first premium was paid and the policy delivered. This requirement of good health when the first premium is paid has reference to a change in the state of health between the application for a policy and payment of the first premium. In the case at bar there could have been no change because the application and the payment of the first premium were on the same day. Furthermore, the incontestable clause prevents a defense on this ground also.

Webster vs. Insurance Co. supra.

Mohr vs. Insurance Co. 32 R. I. 177.

Chinery vs. Insurance Co. 182 N. Y. S. 555.

The paragraphs of the answer sought to be stricken out by the third paragraph of the motion to strike, contain allegations in reference to equities of third parties in connection with the assignments of the policy in suit, but it is well settled that an obligor cannot set up as a defense want of consideration, or fraud upon the obligee who has assigned the obligation.

5 Cor. Jur. P. 940, Sec. 109, pg. 1001, Sec. 210.

Blackford vs. Ins. Co. 101 Fed. 90.

Prouty vs. Roberts, 6 Cushing 19.

Carrie vs. Sears, 4 Allen, 336.

Wood vs. Steele, 65 Alab. 436.

Lehman vs. Clark, 85 Alab. 109.

Kull vs. Thomson, 38 Mich. 685.

Williston on Contracts, Sec. 432, pg. 818.

Wilbur F. Booth, U. S. District Judge.

[File endorsement omitted.]

[fol. 46] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION FOR LEAVE TO AMEND ANSWER TO AMENDED COMPLAINT—Filed November 21, 1924

To Messrs. Ueland & Ueland, Attorneys for Plaintiff:

You will please take notice, that in the above entitled action, on Saturday, the 29th day of November, A. D. 1924, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, defendant will move the court for an order granting it leave to amend its answer to the amended complaint herein by substituting therefor the attached proposed amended answer in lieu of said answer to the amended complaint.

Said motion will be made on the affidavit and proposed amendment of which copies are herewith served upon you and on the pleadings, records, files and proceedings herein.

Dated November 20th, 1924.

O'Malley & O'Malley, Attorneys for Defendant, 900-905 Guardian Life Bldg., St. Paul, Minnesota. John B. Hanten of Counsel, Watertown, S. D.

AFFIDAVIT OF LINUS O'MALLEY

STATE OF MINNESOTA,
County of Ramsey, ss:

Linus O'Malley, being duly sworn, says that he is one of the attorneys for defendant in the above entitled action and resides in Ramsey County, Minnesota; that he has personal knowledge of the facts constituting defendant's defense to said action and verily believes that such facts constitute a good and substantial defense on the merits; that the reason why this affidavit is not made by one of the officers or directors of defendant is that none of the officers or directors of defendant are within this county, wherein resides affiant, as aforesaid.

Linus O'Malley.

Subscribed and sworn to before me this 20th day of November, A. D. 1924. Raymond G. O'Malley. (Raymond G. O'Malley.) Notary Public, Ram-
[fol. 47] sey County, Minn. My commission expires October 2nd, 1931. (Notarial Seal, Ramsey County, Minnesota.)

PROPOSED AMENDED ANSWER TO AMENDED COMPLAINT

Now comes the defendant and for its amended answer to the amended complaint herein alleges:

I

That the assignment described in paragraph 4 of the amended complaint herein to J. E. Jacobson, a copy of which is attached to said Complaint and marked Exhibit A was made by said Mosher to said Jacobson as collateral security for a pre-existing indebtedness owing by said Mosher to the Dazey State Bank, a banking corporation organized under the laws of the State of North Dakota, and located at Dazey, North Dakota.

II

That said J. E. Jacobson at the time of said assignment, prior thereto and during the times of the transactions hereinafter alleged was the president of said bank, and that all of the other officers and directors thereof were members of said Jacobson's family and that said bank was during all of the said times under the sole and active charge and management of said Jacobson.

III

That the amount of the indebtedness for which said policy was assigned as collateral security was the sum of Fifty-six Hundred Eighty-six and 08/100ths ($5,686 08 Dollars, which debt evidenced by certain promissory notes executed to said bank by said Oscar Mosher and his wife, whose full name was and is Sophia Mosher.

IV

That on January 13th, 1923, and for a long time prior thereto said J. E. Jacobson and said Dazey State Bank were each heavily indebted to plaintiff the Midland National Bank, each in a sum in excess of Fifteen Thousand ($15,000.00) Dollars, and that said indebtedness was past due.

[fol. 48] V

That during all of the times of the transactions herein stated, one C. B. Neal was the duly authorized and acting agent of plaintiff in charge of its business in the State of North Dakota and in charge on behalf of plaintiff of all of the transactions to which any reference is herein made.

VI

That on said 13th day of January, 1923, said indebtedness of said Oscar Mosher and said Sophia Mosher to said Dazey State Bank had been reduced to the amount of Forty-one Hundred Ninety-three and 84/100ths ($4,193.84) Dollars, and that said Moshers were not at said time indebted to said Dazey State Bank in any other sum, and that that was their total indebtedness at said time to said bank. That on said 13th day of January, 1923, the said Oscar Mosher was not indebted to said J. E. Jacobson in any sum or amount whatsoever.

VII

That on said 13th day of January, 1923, said J. E. Jacobson and said Neal as agent for plaintiff represented and stated to said Oscar Mosher and said Sophia Mosher that they were desirous of fixing up the said Mosher indebtedness to the Dazey State Bank by having said Moshers execute new notes for said indebtedness, and in lieu of the old notes which had theretofore been executed. That thereupon said *said* Jacobson and plaintiff through its said agent presented to said Oscar Mosher and to said Sophia Mosher for their signatures a number of notes, all of which they stated were renewal notes to the Dazey State Bank to cover said indetedness. That in truth and in fact plaintiff through its said agent and said J. E. Jacobson did actually present renewal notes in the full total amount of said indetedness to said Dazey State Bank, but also added two notes in the sum of Five Thousand ($5,000.00) Dollars each, payable to the order of J. E. Jacobson. That said Moshers had no knowledge that these two notes were among the notes presented to them for execution, and the fact that the two said notes were among the number so presented was not disclosed to them either by said Jacobson or by said

Neal, or by any other person. That relying upon said representations so made to them and in the belief that they were signing only renewal notes covering their indebtedness owing to the said Dazey State Bank, and without reading the same, said Oscar Mosher and said Sophia Mosher [fol. 49] signed all of the said notes, including said two five thousand ($5,000.00) Dollars notes.

VIII.

That there was no consideration whatsoever received by said Moshers or either of them for the execution of the two said Five Thousand ($5,000.00) Dollar notes.

IX.

That thereafter the two said Five Thousand ($5000.00) Dollar notes were endorsed by said J. E. Jacobson to plaintiff as collateral security for his said pre-existing indebtedness to plaintiff.

X.

That thereafter and at or about the time alleged in the amended complaint herein, plaintiff and said J. E. Jacobson procured said Mosher to join in the execution of said assignment of said insurance policy to plaintiff by representing and stating to him that said assignment was for collateral security for the said Mosher indebtedness to said Dazey State Bank. That they further represented and stated to said Mosher at said time that the indebtedness of the Dazey State Bank and the notes evidencing the same had been assigned by said bank to plaintiff; and that they then and there presented to said Mosher for his signature said assignment to plaintiff, a true and correct copy of which is attached to plaintiff's amended complaint. That said Oscar Mosher relied upon the truth of said statements and representations so made to him, and in the belief that the same were true and without reading said assignment or any portion thereof did in fact execute and sign same.

[X.]

That said Oscar Mosher never at any time made or executed any assignment of said policy except as collateral se-

curity for the indebtedness that he owed the Dazey State Bank.

XI.

That on or about June 19th, 1923, an action was commenced by Defendant as plaintiff in the District Court of the first judicial district in the County of Cass in the State of North Dakota against Oscar Mosher, Dazey State Bank, a corporation, Harry St. John, as receiver of Dazey State [fol. 50] Bank, J. E. Jacobson and Midland National Bank of Minneapolis, Minnesota, a corporation, as defendants; that the object and purpose of said action was to have cancelled on the ground of fraud, the policy involved in this action.

XII.

That in said action in North Dakota this defendant attempted to secure jurisdiction of plaintiff by service on its resident agent in the State of North Dakota, and that this plaintiff had full notice of said action, but appeared specially therein and moved to set aside the service of the Summons in said action upon the ground that the Court was without jurisdiction as to it, which said motion was granted and thereupon the said court's order was duly made setting aside the said service. That jurisdiction was obtained over the other said defendants and that while said action was pending said Oscar Mosher died.

XIII.

That said Oscar Mosher died intestate, a resident of Barnes County, North Dakota, and that thereafter such proceedings were duly had in the County Court of said Barnes County; that the Court by its order appointed Sophia Mosher administratrix of his estate, and that ever since said time she has been, and still is, the duly acting and qualified administratrix thereof.

XIV.

That thereafter upon application duly made the said District Court, first judicial district, in said County of Cass duly made its order substituting said Sophia Mosher ad-

ministratrix of the estate of Oscar Mosher for said Oscar Mosher as party defendant in said action.

XV.

That on the 12th day of May, 1924, said Court duly made, entered and docketed its judgment in said action in favor of the plaintiff Dakota Life Insurance Company in said action and against defendant Sophia Mosher as administratrix of the estate of said deceased Mosher, wherein and whereby it determined, adjudged and decreed that policy No. 18,260 theretofore issued by Dakota Life Insurance Company of Watertown, South Dakota, on the life of Oscar Mosher in the sum of Ten Thousand ($10,000.00) Dollars, dated June 10th, 1920, be cancelled, annulled and adjudged to be void and of no effect from the beginning.

[fol. 51] XVI.

That at the time that this defendant approved the said assignment from said Jacobson to plaintiff it was without knowledge of the facts hereinbefore alleged relative to the method and means whereby plaintiff procured said assignment, and that if this plaintiff had had knowledge of such facts it would have refused to approve said assignment.

XVII.

That all of the premiums alleged in the amended complaint to have been paid were in fact paid by the Dazey State Bank of Dazey, North Dakota.

XVIII.

That by reason of the foregoing, this plaintiff has no title, right or interest in or to said policy.

XIX.

Further answering, defendant denies each and every allegation, matter and thing contained in paragraph 5 of the amended complaint save insofar as the same are admitted by the allegations hereof, and denies each and every allegation, matter and thing contained in paragraph 16 of plaintiff's amended complaint.

Wherefore, Defendant prays that plaintiff take nothing by this action, and that it be given judgment for its costs and disbursements herein.

O'Malley & O'Malley, Attorneys for Defendant, 900-905 Guardian Life Bldg., St. Paul., Minnesota. John B. Hanten, of Counsel, Watertown, South Dakota.

Duly sworn to by Linus O'Malley. Jurat omitted in printing.

[fol. 52] (Endorsed:) Due service of within notice of Motion, Affidavit and Proposed Amended Answer to Amended Complaint is hereby admitted at Minneapolis, Minnesota, this 21st day of November, A. D. 1924.

Ueland & Ueland, Attorneys for Plaintiff.

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION TO AMEND ANSWER TO AMENDED COMPLAINT—Filed April 28, 1925

The above entitled cause came regularly on for hearing upon a motion by the defendant for leave to amend its answer to the amended complaint herein.

Messrs. O'Malley & O'Malley and John B. Hanten, Esquire, appeared in support of said motion; and Messrs. Ueland & Ueland appeared in opposition thereto.

The Court having heard the arguments of counsel and duly considered the same, together with the files and record in said action, hereby Orders that said motion be, and the same is hereby, granted; Ordered further that plaintiff may have twenty (20) days from the date of filing of this order within which to reply to said amended pleading, if it be so advised.

Wilbur F. Booth, United States Circuit Judge, Acting by Assignment.

Memorandum

The facts alleged in the proposed amendment to the answer to the amended complaint in my judgment have a bear-
[fol. 53] ing upon the questions whether plaintiff has any ownership in the policy in question, and if it has, whether the ownership is a general or a limited one.

In these respects at least, the allegations of the proposed amended — differ from the allegations of the former answer which were stricken out on motion.

Wilbur F. Booth, United States Circuit Judge, Acting by Assignment.

[File endorsement omitted.]

In United States District Court

Reply to Amended Answer to Amended Complaint—Filed May 11, 1925

Plaintiff for its reply to the amended answer to the amended complaint herein:

1. Admits that J. E. Jacobson on October 10, 1921 was the president of the Dazey State Bank; admits that on January 13, 1923 said J. E. Jacobson and said Dazey State Bank were each heavily indebted to plaintiff, each in a sum in excess of $15,000; admits that Oscar Mosher and Sophia Mosher on or about January 13, 1923 signed two notes each for $5,000 payable to the order of J. E. Jacobson and that thereafter said notes were endorsed and delivered by said J. E. Jacobson to plaintiff; and admits the allegations of paragraphs XI, XII and XIII thereof.

2. Alleges that as to the allegations of paragraphs XIV, XV, and XVII of said amended answer plaintiff has not knowledge or information thereof sufficient to form a belief and therefore denies the same.

3. Denies each and every allegation of said amended answer except as hereinbefore expressly admitted or qualified.

4. Alleges that on or about January 13, 1923 said Oscar Mosher and Sophia Mosher made and delivered to said J. E. Jacobson two promissory notes each dated on that

day, by each of which promissory notes said Oscar Mosher and Sophia Mosher jointly and severally promised to pay to said Jacobson, or his order, $5,000 on demand with interest from January 13, 1923 at the rate of 10% per annum; that thereafter, on or about March 2, 1923, said Jacobson endorsed both of said notes to plaintiff as collateral security to the indebtednes of said Jacobson to plaintiff which [fol. 54] was then in excess of $32,000.00 and is still in excess of $26,000.00 exclusive of interest, and also as security to the indebtedness of said Jacobson on account of his guaranty of the indebtedness of said Dazey State Bank to plaintiff in the sum of $25,000.00; that the insurance policy of defendant set forth in the amended complaint and the assignment thereof, Exhibits B and C to the amended complaint, were delivered to plaintiff by said Jacobson in connection with the pledge of said notes and as collateral security for the payment of the same; that it was agreed in writing between said Jacobson and plaintiff that plaintiff, upon failure of said Jacobson to pay any of such indebtedness to plaintiff when due, might sell all collateral securities held by plaintiff against any or all of the indebtedness of said Jacobson to plaintiff, and to apply the proceeds of such sale towards the payment of any or all such indebtedness;

5. That pursuant to said written agreement with said Jacobson, plaintiff on the 28th day of June, 1923, upon due notice and pursuant to the statute in such case made and provided, caused said notes, insurance policy, and assignments to be sold by the Sheriff of Hennepin County and State of Minnesota at public auction; that at such sale said Sheriff sold said notes, insurance policy, and assignments to plaintiff, it being the highest bidder; that said sale was openly, honestly and fairly made and conducted, and that said notes, insurance policy and assignments were in view at the time of sale; that said sale was in all respects conducted in accordance with law, and that plaintiff since the 28th day of June, 1923, has been, and now is, the absolute and unqualified owner of said notes, said policy, and said assignments.

6. That plaintiff accepted said notes, insurance policy, and assignments, and thereafter lent money to said Jacob-

son and extended credit to said Jacobson and said Dazey State Bank, whose indebtedness to plaintiff was guaranteed by said Jacobson as aforesaid, and plaintiff purchased said notes, insurance policy and assignment at sheriff's sale as aforesaid, all in good faith and in reliance upon said Mosher's execution of said notes and execution and acknowledgment of said assignments, Exhibits B and C to the amended complaint.

7. That although payment of said notes has been demanded, no part thereof has been paid either on account of principal or interest and plaintiff is informed and believes [fol. 55] and alleges the fact to be that said Sophia Mosher and the estate of Oscar Mosher are wholly insolvent.

Ueland & Ueland, Plaintiff's Attorneys, 401 New York Life Bldg., Minneapolis, Minnesota.

Duly sworn to by Edgar L. Mattson. Jurat omitted in printing.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES OF TRIAL—October 19, 1925

Monday morning.
Court opened pursuant to adjournment.
Present: Honorable John B. Sanborn, Judge.

The above entitled cause coming regularly on for trial this day to the court and jury, Messrs. Ueland & Ueland appear as attorneys for the plaintiff, and Messrs. O'Malley & O'Malley appear as attorneys for the defendant, Messrs. Hauten & Hauten also appear for the defendant.

A jury being called comes as follows, to-wit:

[fol. 56] Conrad Johnson, C. M. Erskine, J. G. Kuck, Oscar Oswald, August C. Johnson, Walter McNallan, D. D. Webster, F. M. Plank, Victor Leedholm, Howard E. Foss, Kenneth Armson, and S. E. Lambert being twelve free and

lawful men who are duly empanelled as a jury and sworn to try the issues joined herein.

Mr. Ueland opens and states the case to the Court and jury on the part of the plaintiff.

Edgar L. Mattson is sworn, is examined and testifies as a witness on behalf of the plaintiff.

And here the plaintiff rests its case.

Mr. Hauten (of counsel for the defendant) opens and states the case to the Court and jury on the part of the defendant.

Edgar L. Mattson is recalled and is cross-examined under the statute.

Clarence B. Neal is called by the defendant for cross-examination under the statute, to which counsel for plaintiff object on the ground of his not being subject to such cross-examination, which objection is by the Court sustained.

And the further trial of said cause is continued until 10 o'clock A. M. of the following day.

October 20th, 1925.

Tuesday morning.
Court opened pursuant to adjournment.
Present: Honorable John B. Sanborn, Judge.

The above entitled cause coming on for further trial this day to the court and jury, the parties appear by their respective counsel as on the preceding day, and the jury being called and all being present, the following proceedings are had:

Sophia Mosher is sworn, is examined and testifies as a witness on behalf of the defendant.

And here the defendant rests its case.

[fol. 57] Counsel for the plaintiff moves the Court that the jury be instructed by its verdict to find for the plaintiff.

Counsel for the defendant moves the Court that the jury be instructed by its verdict to find for the defendant.

Said motions are duly submitted to the Court and taken under advisement; whereupon it is by the Court

Ordered: That the jury herein be and they are hereby discharged.

IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—December 30, 1925

This cause came on to be tried at a General Term of this Court held at the City of Minneapolis, Minnesota, on the 19th day of October, 1925.

Ueland & Ueland appeared for the plaintiff, and O'Malley & O'Malley and Hanten & Hanten for the defendant.

At the close of all the testimony, each of the parties moved for a directed verdict, whereupon the jury was discharged and the Court took the cause under advisement.

After hearing the arguments of counsel, from the admissions contained in the pleadings and the evidence, adduced the Court finds generally in favor of the plaintiff, and that it is entitled to judgment against the defendant for the sum of $9,724.06, with interest thereon at the rate of six (6) per cent per annum from the 12th day of October, 1923, together with its costs and disbursements herein.

Let judgment be entered accordingly.

Dated this 30 day of December, 1925.

John B. Sanborn, U. S. District Judge.

[fol. 58] Wherefore by reason of the premises aforesaid, it is now by the Court

Considered, Ordered and Adjudged that said plaintiff Midland National Bank of Minneapolis, a corporation, do have and recover of and from the defendant Dakota Life Insurance Company, a corporation, the sum of Eleven Thousand Sixty-six and 04/100 ($11,066.04) Dollars together with its costs and disbursements in this behalf expended, to be taxed, and that said plaintiff do have execution therefor.

Further Ordered: that all further proceedings herein except the taxation of costs and entry of judgment therefor be and the same are hereby stayed for a period of Forty-two (42) days to enable this defendant to prepare and present a bill of exceptions and make a motion for a new trial.

IN UNITED STATES DISTRICT COURT

OPINION—Filed December 30, 1925

The plaintiff is a national bank located in Minneapolis, Minnesota; the defendant a life insurance company of South Dakota. On May 14, 1920, the defendant issued a $10,000 life policy to Oscar Mosher, of Dazey, North Dakota. On or about October 10, 1921, the insured assigned the policy to J. E. Jacobson, a resident of the same place, a duplicate of the assignment, on October 18, 1921, being filed at the home office of the defendant. On or about February 26, 1923, Mosher and Jacobson assigned the policy to the plaintiff, a duplicate of which assignment was, on March 2, 1923, filed at the home office of the defendant and approved by it. At the time of the assignment of the policy to the plaintiff, Jacobson was indebted to the plaintiff in an amount considerably in excess of the face of the policy, which indebtedness was not then due. The State Bank of Dazey, of which Jacobson was President, was also indebted to the plaintiff in a large amount, at least $25,000 of which indebtedness was represented by demand notes. The plaintiff had been endeavoring to collect these notes, but had not succeeded, and the notes were guaranteed by Jacobson. Oscar Mosher died on September 10, 1923, while the policy was in full force and effect, at his residence near Dazey, North Dakota. The premiums had been paid in cash, except that the time for the payment of the premium of $394.20 due on the policy on November 28, 1922, was, by written agreement and in consideration of the sum of $118.26 and the further sum of $16.56 as interest paid to the defendant, extended for one year. This agreement provided that, in the event of Mosh-
[fol. 59] er's death within the period of extension, the face of the policy should be paid, subject to deduction of the premium of $394.20 originally due on November 28, 1922,

and that the sum of $118.26 should, in that event, be repaid. On October 12, 1923, the plaintiff furnished proofs of death, as provided in the policy. All of the conditions required to be performed by Mosher and the plaintiff to mature the policy had been performed, and the sum of $9,724.06 has been demanded from the defendant by the plaintiff, but has not been paid.

This suit was brought to recover this amount. The defendant in its answer to the amended complaint set up that the policy had been procured by fraud on the part of Mosher, the insured, Jacobson, the agent of the defendant, and Kellogg, its medical examiner; that Mosher was indebted to the bank and not to Jacobson, and that the assignment by Jacobson of the policy to the plaintiff was never authorized by the bank and was a fraud upon it, and that the insurance policy was stolen from the bank, and that there was no consideration for the assignment; that the defendant, at the time it approved the assignment, had no knowledge of these facts, and would not have approved it had it known them. A motion was made to strike out certain allegations of this answer on the ground that fraud was not a defense to the policy in view of the fact that the laws of North Dakota required the insertion of the "incontestable clause," which eliminated that defense after a period of two years; and also the allegations with respect to the invalidity of the assignment from Jacobson and Mosher to the plaintiff, on the ground that the insurance company could not have the benefit of equities existing in favor of third persons. Judge Booth, then United States District Judge, granted the motion to strike.

Thereupon, with the consent of the Court, the defendant filed an amended answer setting up substantially the same defenses as the first answer. The plaintiff then made a motion for judgment on the pleadings. This motion was denied by Judge Booth, apparently upon the theory that if the plaintiff had procured the assignment of the policy without any consideration whatsoever or had no title to it, it could not recover.

The evidence shows that the policy, together with an assignment of it signed by Oscar Mosher and J. E. Jacobson and acknowledged by them and approved by the Dakota Life Insurance Company, which recites that it is given to secure

the payment to the Midland National Bank of the sum of [fol. 60] $10,000 according to the tenor and condition of two promissory notes, was delivered to the Midland National Bank as collateral security to Jacobson's obligations to the Bank, on or about March 2, 1923, together with two $5,000 Mosher notes dated January 13, 1923, payable on demand to J. E. Jacobson at the Dazey State Bank, Dazey, North Dakota, with interest at 10% per annum, and endorsed by Jacobson. That on February 26, 1923, the State Bank of Dazey closed its doors; that Jacobson was in default in the payment of his notes, and the notes of the State Bank of Dazey were unpaid; and on the 12th day of June, 1923, the plaintiff proceeded to foreclose upon this and other collateral which it held as security for this indebtedness, pursuant to the collateral agreement of Jacobson made on the 11th day of February, 1921. That on the 23rd day of June, 1923, pursuant to notice, the Sheriff of Hennepin County sold such collateral to the plaintiff.

On the trial, the defendant offered to prove fraud in the procurement of the policy, the fact that the policy had since been cancelled by a suit in a State District Court of North Dakota, to which suit the plaintiff was not a party, fraud in connection with the assignment of the policy by Jacobson and Mosher to the Midland National Bank, and lack of any consideration moving to Mosher, all of which evidence was rejected by the Court upon the same theory that the allegations of the answer to the amended complaint were originally stricken out. The right of the defendant to show want of consideration to Mosher and fraud in connection with the assignment by him to the bank seems to be denied by the following authorities cited by Judge Booth:

5 Cor. Jr. p. 940, Sec. 109; p. 1001, Sec. 210;
Blackford vs. Ins. Co., 101 Fed. 90;
Prouty vs. Roberts, 6 Cushing 19;
Carrie vs. Sears, 4 Allen, 336;
Wood vs. Steele, 65 Ala. 436;
Lehman vs. Clark, 85 Ala. 109;
Kull vs. Thompson, 38 Mich. 685;
Williston on Contracts, Sec. 432, p. 818.

In view of the state of the record, the only question now to be decided by this Court is whether it appears from the

evidence that the plaintiff took the notes and the policy for a valuable consideration.

[fol. 61] Under the Negotiable Instruments Act, Chap. 113, Laws of North Dakota 1899, it is expressly provided that "an antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time." The law in Minnesota Chap. 272, Laws of Minnesota 1913, is the same. Furthermore, this was the law prior to the Negoitable Instruments Act.

Bank of Montreal vs. Beecher, 133 Minn. 81;

German Am. State Bank vs. Lyons, 127 Minn. 390;

Snelling State Bank vs. Clasen, 132 Minn, 404;

See also: Uniform Laws annotated, Vol. 5, Negotiable Instruments Act, p. 229, and cases cited.

It therefore appears that the plaintiff, at the time it made the demand upon the defendant for payment of this policy, was the owner and holder, for value, of the two negotiable promissory notes signed by the insured and of the insurance policy which had been given to secure their payment, and, so far as the defendant was concerned, was entitled to receive the face of the policy less the deduction heretofore referred to.

John B. Sanborn, U. S. District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION FOR NEW TRIAL—Filed March 16, 1926

To Messrs. Ueland & Ueland, Attorneys for Plaintiff:

You will please take notice, that on the minutes of the Court, at a special term of the above Court to be held in the Federal Building, in the City of Minneapolis, Minnesota, on Saturday, the 27th day of March, A. D. 1926, at 10:00 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, the defendant will move the Court for an order vacating and setting aside the findings and judgment heretofore entered herein and granting a new trial of this cause on the following grounds:

I. That the Court erred in sustaining plaintiff's objection to defendant's exhibit 4, and in refusing to admit the same in evidence.

[fol. 62] II. That the Court erred in sustaining plaintiff's objection to the offer of defendant to prove the following facts by the witness Sophia Mosher:

That at the time the notes were signed, there was a reference made to renewing the paper for the coming year, on the obligations that existed on the part of Oscar Mosher and Sophia Mosher to the Dazey State Bank and to J. E. Jacobson, and that there were at that time, papers written out and submitted to them for signature, including Exhibit 5, being the note for $1,500.00, dated January 13th, 1923, payable to the Dazey State Bank, signed by Oscar Mosher and Sophia Mosher; that the same was afterwards endorsed by the Dazey State Bank, by J. Jacobson, President, and afterwards again endorsed by the First National Bank of Fargo, North Dakota, by E. V. Bassett, and afterwards endorsed "pay to the order of Ed. Ladbury without recourse", and that said not was settled for and paid by this witness. That at the same time there was a chattel mortgage executed to secure the payment of this note, dated on the same day, due October 15th, 1923, and describing the crop to be raised on the said premises during the said year of 1923, witnessed by C. B. Neal and R. C. Jacobson, which mortgage was filed on the 19th day of January, 1923 at 9:05 o'clock A. M. in the office of the Register of Deeds of Barnes County, North Dakota; the same being duly authenticated as to being a copy. That at the same time there was a note executed for the sum of $2,010.86 to the Dazey State Bank, and that the same was signed by Oscar Mosher and Sophia Mosher, due October 15th after date, and endorsed by the Dazey State Bank, and that there was a chattel mortgage made to secure the same, at the same time, on the 13th day of January, 1923, to secure the payment of said $2,010.86 note, on a lot of machinery, and witnessed by C. B. Neal and R. C. Jacobson, which was filed on the 29th day of January, 1923 in Barnes County, North Dakota. The same will be offered as an exhibit duly authenticated copies, with the witness' testimony. That at the same time there was a note made for $1,646.49, signed by Oscar Mosher and Sophia Mosher, payable to J. E. Jacobson, at

Dazey, North Dakota, and secured by machinery, personal property, and also the crop for the year 1923, to be raised, and that the same was filed on the 2nd day of February, 1923 at 9:04 o'clock A. M. in the office of the Register of Deeds of Barnes County, North Dakota, this being marked as Exhibit 2 for the Defendant, and including the authentication by the proper officers. The certified copy, or au- [fol. 63] thenticated copy of the chattel mortgage for $2,010.86 to secure the payment of that note, being marked as Defendant's Exhibit 1, and the one to secure the payment of the $1,500.00 note being marked as Defendant's Exhibit 3. That later, but not on the same day, there was a note signed, in the sum of $682.98, to be signed by Oscar Mosher and Sophia Mosher, being marked Defendant's Exhibit 6. That the same was transmitted in blank to be signed, by letter, mailed from the Dazey State Bank, and received through the United States mail, and with that note there was a letter evidenced by Defendant's Exhibit 6, to be made a part of the testimony of this witness, sent out by the Dazey State Bank and signed by J. E. Jacobson as an officer of said bank. That this defendant's Exhibit 6 came into her possession after her husband's death as administratrix of his estate, and as being part of the papers that were left after his death and were found in their home on the farm out of Dazey, North Dakota; that this note was signed by Oscar Mosher and Sophia Mosher and returned to the Dazey State Bank, and that the said note, was afterwards called to the payment of Sophia Mosher for payment. Demand for payment was made on her, on the said note; that said note is not paid; that it is still in the possession of the Receiver of Closed Banks of North Dakota. That Defendant's Exhibit 7 was found among the papers in her home, after the death of her husband and was produced by her and turned over to the attorney for the Dakota Life Insurance Company, and that it is a demand for the payment of the $2,010.86 note, made January 13th, 1923, and due October 13th, 1923, by the Midland National Bank, now this plaintiff. That at that time there was only one statement made, at the time that the notes were signed, and that was that they were there to secure the renewal of the note, the amount that was due to the Dazey State Bank and J. E. Jacobson at that time, and that the papers were laid

on the table, and were then signed; that there was no statement made of any $5,000.00 notes. There was no statement made that there were two $5,000.00 notes to be signed; that there was nothing stated as to an amount of $10,000.00 being turned over or being paid, or that there was any amount of that kind due from Oscar Mosher or from Sophia Mosher; that these notes, if they were signed by Oscar Mosher and Sophia Mosher, were not called to their attention, and that Oscar Mosher and Sophia Mosher did not receive any consideration for the said notes. Two photostatic copies furnished counsel for defendant of said notes [fol. 64] being marked Defendant's Exhibits 8 and 9. That there had been no prior debt of Oscar Mosher's or her's, for which these two $5,000.00 notes were made; that all that the Dazey State Bank and J. E. Jacobson had against them at that time was about $5,500.00. That they had no property except machinery and horses, and cattle, and that the total value of that property at that time was far less than the amount of $5,500.00 that they owed to the Dazey State Bank and J. E. Jacobson, and that beside that they were indebted to the First National Bank of Valley City, North Dakota, to an amount around $3,500.00; that they had a farm, and this was foreclosed by J. E. Jacobson on the 13th day of February, 1915, and the time of redemption expired on the 13th day of February, 1916, and that from that time on the farm was leased to them by J. E. Jacobson, and that they paid rent every year for the said land. Also offer to show authenticated copy of Exhibits 1, 2 and 3, schedules of mortgages, and also offer defendant's exhibit- 8 and 9. Also offered in evidence the record marked as Defendant's Exhibit 10, being authenticated bill or statement of notes, relating to the Dazey State Bank's account against Oscar and Sophia Mosher, and showing all notes paid except three, one of $2,010.86, one of $1,500.00 and one of $682.98.

III. That the Court erred in sustaining plaintiff's objection to the offer of defendant to prove the following facts by the witness J. J. Bell, actuary of the defendant company:

That he approved this assignment of the policy, which approval which was actually executed by the insurance company was already in evidence. That he approved said

assignment, subject, however, to all the terms and conditions set forth in said policy, on the 2nd day of March, 1923, at his office at Watertown, South Dakota, and it was then transmitted by him by mail to the Midland National Bank of Minneapolis, Minnesota, and that at the time that this assignment was made and approved he was not aware of any defenses that existed or might exist relative to the said policy of $10,000 described in the said assignment, and he was not aware that the said two promissory notes aggregating $10,000.00 described in the said assignment, and for which the said assignment was made to secure the payment of the same, were made without consideration on the part of the said insured, and that the two notes were executed without knowledge of the signers and that the signing of the same had been procured by a trick or decep-
[fol. 65] tion, and also that the attention of the signers was called to the execution and signing of other notes and chattel mortgages securing the same, no reference having been made to the execution of the said two notes; that he believed at the time that he approved the said assignment, that there was consideration, and that the notes were actually due, or that there had been consideration passed to the makers of the notes, and that if he had been informed of the true state of facts, that said assignment would not have been approved.

IV. That the Court erred in sustaining plaintiff's objection to the offer of defendant to prove the following facts by the witness Maxwell Ladbury:

That he had a conversation with C. B. Neal, the representative of the plaintiff and the party who was present at the time that these notes were executed on the 13th day of January, 1923, having reference now to the two $500.00 notes and the three other notes, one being for $1,500.00, one being for $2,010.00 and the other for $1,646.00 to J. E. Jacobson; that this conversation took place at the hotel at Dazey, North Dakota, during the fall of 1923 and that this was the only conversation he had with him during that fall, in which C. B. Neal stated that these papers were all prepared and taken out to the farm, and they went there to get them signed, and that the papers were signed, and [the] left; that before they went out there, he had the opinion that these two $5,000.00 notes were of no account,

and that he doubted if they would be signed; that after he got there, the notes were signed, and they were taken up and brought to Dazey, North Dakota.

V. That the Court erred in denying the defendant's motion to strike from the evidence in the case plaintiff's Exhibits D. and E.

VI. That the Court erred in making his general finding in favor of the plaintiff and against defendant because said finding is not sustained by the evidence and is contrary to law.

Dated March 11th, 1926.

O'Malley & O'Malley, Attorneys for Defendant,
900-905 Guardian Life Bldg., St. Paul, Minnesota.

[fol. 66] John B. Hanten, Watertown, S. D. of Counsel.

(Endorsed:)

Service of within Notice of Motion is hereby admitted this 12th day of March, A. D. 1926.

Ueland & Ueland, Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court

Order Staying Execution of Judgment—Filed March 22, 1926

It Is Hereby Ordered, That execution of judgment herein be, and the same hereby is, stayed for a period of forty-two (42) days after the 24th day of March, 1926.

Dated March 22nd, 1926.

John B. Sanborn, District Judge.

[File endorsement omitted.]

In United States District Court

Order Denying Motion for New Trial—Filed April 12, 1926

Defendant's motion for a new trial coming on to be heard on the minutes of the Court at a special term held in Fed-

eral Building in the City of Minneapolis, Minnesota, on Saturday, the 10th day of April, 1926, Messrs. O'Malley & O'Malley and John B. Hanten, Esq. appearing for the defendant in support of the motion, and Messrs. Ueland & Ueland appearing for the plaintiff in opposition thereto, and the Court having heard the arguments of counsel and being fully advised in the premises,

It is Ordered that said motion be, and the same hereby is denied.

Dated April 12, 1926.

John B. Sanborn, District Judge.

[File endorsement omitted.]

In United States District Court

Notice of Filing of Bill of Exceptions—Filed April 22, 1926

To Messrs. Ueland & Ueland, Attorneys for record for Midland National Bank of Minneapolis, a corporation:

[fol. 67] Please take notice that we have this, the 22nd day of April, A. D. 1927, filed in the office of the Clerk of the District Court of the United States in which this case is pending a bill of exceptions to the rulings of the Court in the trial of the above cause, a copy whereof is herewith served upon you, and the same will be presented to the Honorable John B. Sanborn, who tried the case, for approval and settlement, on Saturday, the 1st day of May, A. D. 1926, at 10:00 o'clock A. M., at a special term of said Court to be holden in the Federal Post Office and Court House in St. Paul, Ramsey County, Minnesota.

O'Malley & O'Malley, Attorneys for Defendant,
900-905 Guardian Life Bldg., St. Paul, Minnesota.
John B. Hanten, Watertown, S. Dak.

(Endorsed:) Service of within Notice is hereby admitted this 22nd day of April, A. D. 1926.

Ueland & Ueland, Attorneys for Plaintiff

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed May 1, 1926

CAPTION

The above entitled action came on for trial on October 19th, 1925, before Honorable John B. Sanborn, one of the Judges of the above named Court, with a jury, at the Federal Building, Minneapolis, Minnesota, said case being on the October, 1925, term of the above named Court.

There were present and appearing, Messrs, Ueland & Ueland, by Sigurd Ueland, Esq., on behalf of the Plaintiff; Messrs. O'Malley and O'Malley, by Linus O'Malley, Esq., and John B. Hanten, Esq., of Watertown, South Dakota; on behalf of the Defendant;

Thereupon the following proceedings were had, and testimony taken:

Mr. Ueland: When this action was begun, the name of the Plaintiff was "Midland National Bank of Minneapolis," and the name of the defendant was "Dakota Life Insurance Company." Since that time the defendant has changed its name to the Midland National Life Insurance [fol. 68] Company of Watertown, South Dakota and the plaintiff has changed its name to the Midland National Bank & Trust Company. Plaintiff moves that the names be changed to what they are at present, the Midland National Bank & Trust Company and, Midland National Life Insurance Company of Watertown, South Dakota.

The Court: It may be done.

Mr. Ueland: The names of the parties have been somewhat changed, but for the purpose of simplicity, I am going to refer to the Plaintiff as the Midland National Bank, and to the Defendant as the Dakota Life Insurance Company. The plaintiff will show that the Dakota Life Insurance Company issued its policy on the life of one Oscar Mosher, who was a farmer out at Dazey, North Dakota. This policy was originally payable, in the case of the death of Oscar Mosher, to his estate. We will show that by assignment, this policy was first assigned by Mosher, to a man by the name of J. E. Jacobson, who was a banker at Dazey, North Dakota, and then we will show that by

another assignment, the policy was then assigned by Oscar Mosher and J. E. Jacobson to the plaintiff, the Midland National Bank, and we will show that this last assignment was given to secure two notes of $5,000.00, aggregating $10,000.00, which notes were signed by Oscar Mosher and his wife, and made payable to the order of J. E. Jacobson, whom I just mentioned, and that the notes were transferred to the Midland National Bank by Jacobson as collateral security for Jacobson's indebtedness to the bank, and that thereafter the Midland National Bank foreclosed this collateral security which Jacobson had put up, and thus acquired absolute title to the two $1,000.00 notes and the policy, which we contend secured the same. It is admitted in the pleadings that Oscar Mosher is dead; that he died while the policy was still in force and that there was no default in the payment of the premium, and so the plaintiff's contention is that it had become the owner of these two $1,000.00 notes and this $10,000.00 policy which was in force at the time of Mosher's death, and that the plaintiff is therefore entitled to the entire amount due on the policy.

Mr. O'Malley: Did I understand you to say that this policy was assigned as collateral to two $1,000.00 notes?

Mr. Ueland: Two $5,000.00 notes.

[fol. 69] (Plaintiff's Exhibits A, B and C, being the insurance policy and the two assignments thereof, marked for identification by the Reporter.)

Mr. Ueland: Plaintiff offers in evidence, Plaintiff's Exhibits A, B and C.

The Court: Received.

(Plaintiff's Exhibits D and E, promissory notes, marked for identification by the reporter.)

Mr. Ueland: Plaintiff offers in evidence, Plaintiff's Exhibits D and E.

Mr. O'Malley: No objection.

The Court: Received.

EDGAR L. MATTSON, a witness on behalf of Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Ueland:

Q. Mr. Mattson, will you please state your full name, and your occupation?

A. Edgar L. Mattson, Vice-president of the Midland National Bank & Trust Company of this city.

Q. That is the plaintiff that you refer to, is it, Mr. Mattson?

A. Yes.

Q. And how long have you been Vice-President of the plaintiff?

A. I think it is ten years.

Q. I show you two documents marked as Plaintiff's Exhibits D and E, and ask you to state what they are.

A. They are two promissory notes of $5,000.00 each, payable on demand to J. E. Jacobson, and by him endorsed, and they are signed by Oscar Mosher and Sophia Mosher, and dated January 13th, 1923.

Q. These exhibits, Mr. Mattson, are they now owned by your bank?

Mr. O'Malley: We object to that as calling for a conclusion of the witness.

The Court: Well, I presume that is a conclusion, possibly.

Q. Mr. Mattson, are these Exhibits D and E now in the possession of your bank?

A. They are.

Q. And have they been in the possession of your bank for some time?

A. Yes.

[fol. 70] Q. When did you first receive them?

A. March 2nd, 1923.

Q. Calling your attention to the back of Plaintiff's Exhibits D and E, I ask you to state whose endorsement appears thereon?

A. The endorsement of J. E. Jacobson of Dazey, North Dakota.

Q. Did you receive these notes from J. E. Jacobson?
A. We did.
Q. Your bank received these notes from J. E. Jacobson?
A. Yes.
Q. Showing you Plaintiff's Exhibits A, B and C, the life insurance policy in evidence, and the two assignments of that policy, I ask you whether or not you received the two notes at the same time and in connection with the receipt of the policy and the two assignments?
A. We did.

Mr. Ueland: Will the defendant admit the genuineness of Oscar Mosher's signature on these notes?
Mr. O'Malley: We will admit that he signed the notes.
Mr. Ueland: You will admit that Oscar Mosher signed the notes?
Mr. O'Malley: Yes.
Mr. Ueland: And that Oscar Mosher is the insured under the insurance policy in evidence?
Mr. O'Malley: Yes.

Q. Now Mr. Mattson, please state for what purpose the plaintiff bank received Exhibits A, B, C, D and E.

Mr. O'Malley: Objected to as calling for a conclusion of the witness, and not the best evidence; incompetent for that reason.
The Court: Isn't that covered by the documents?
Mr. Ueland: It is the best evidence. There is no better evidence that I know of.
Mr. O'Malley: The documents show for themselves, why they were received, as I understand it.
Mr. Ueland: Not by the plaintiff.
Mr. O'Malley: You have a collateral agreement there, haven't you, in writing? It is pleaded.
[fol. 71] Mr. Ueland: Well, if we have a collateral agreement, it is not yet in evidence.
The Court: Does the assignment of the policy refer to the notes?
The Witness: Yes, that particular one does.
Mr. Ueland: It refers — two; this assignment is given to secure the payment of the sum of $10,000.00, according to the tenure of two promissory notes——

The Court: Well, it seems to me then that it does cover it, that is, if this is shown to be the indebtedness referred to.

Mr. O'Malley: I don't think he could change the agreement any by testimony. I think that shows the agreement.

Mr. Ueland: The point of the question was to show for what purpose the notes were received. The policy and the assignment show that the policy was given to secure the notes.

The Court: I think I will permit him to answer the question.

Mr. O'Malley: May I be permitted to ask the witness a question first?

The Court: Yes.

Cross-examination.

By Mr. O'Malley:

Q. Were you present when these notes were given?

A. You mean, when they were executed?

Q. Yes.

A. No.

Q. Were you present when they were endorsed by Mr. Jacobson?

A. No.

Q. Who was, on behalf of the bank?

Mr. Ueland: That is objected to as misleading.

Q. Well, who was present representing the bank, or who took these notes?

A. They came to us by mail.

Q. From whom?

A. Mr. Jacobson.

Q. And the transaction covering the notes—was that carried on with Mr. Jacobson by correspondence?

A. Partly.

Q. And partly oral?

A. I think it probably was entirely by correspondence, as far as I can remember. There may been some conversa- [fol. 72] tion. He came down every once in a while. I am not clear on that.

Q. Have you the correspondence covering the transaction?

A. Why, I think so. I don't know whether I have it with me or not. There was a letter where the notes were sent in. I think I have it. Let's see. (Examines papers) I don't seem to have the letter with me.

Q. Well, the negotiations, Mr. Mattson, which eventuated in your getting these notes, was all carried on by correspondence with Mr. Jacobson, wasn't it, by your bank?

A. I would not say positively. I seem to have some recollection that Mr. Jacobson—yes, I am quite sure that Mr. Jacobson, on one of his visits, discussed these notes and subsequently sent them down to us.

Mr. O'Malley: That is all of the questions I wanted to ask. I renew my objection. If there was some correspondence about it, it seems to me that that is the best evidence.

The Court: I think the objection will have to be sustained if Mr. Mattison has no personal knowledge of the matter.

Direct examination (Continued).

By. Mr. Ueland:

Q. Mr. Mattson, I show you a paper which will be marked as Plaintiff's Exhibit F, and ask you to state what that it.

(Plaintiff's Exhibit F marked for identification by the reporter.)

A. That is the bank record card, of collateral, in its files.

Q. Is it one of the original records of the bank?

A. Yes.

Q. And do I understand that Exhibit F shows the receipt of collateral by your bank?

A. Yes.

Q. Are the entries on the exhibit made contemporaneously with the receipt of collateral?

A. Yes.

Q. Were the entries on this particular sheet made under your supervision by a person authorized to make them?

A. They were made by one of the employees of the department.

Q. Under your supervision, your general supervision?

A. The employees under my personal supervision, yes.

Q. Do you recognize the handwriting?
A. Yes.
Q. Whose handwriting is it?
A. It is Miss Statine.
[fol. 73] Q. And she is or was at the time, an employee of your bank?
A. Yes.
Q. Are the entries on that card, Plaintiff's Exhibit F, just and true?
A. They are.
Q. I call your attention to the entry on this Exhibit, under date of March 2nd, 1923, and ask you to state what that indicates?
A. The entry on March 2nd, 1923 is the record of these two $5,000.00 notes, with this insurance policy attached, regarding which I have just been—which I have just identified, the other exhibit.
Q. I call your attention to this part of the entry, "18260, Dakota Life Insurance policy for $10,000 attached, assignment Mosher to Jacobson and assignment, J. E. Jacobson to Midland." Please state what that indicates.

Mr. O'Malley: Objected to as calling for a conclusion, not the best evidence, and before interrogating this witness any further about this, I think it should be received in evidence.

Mr. Ueland: I think the witness can explain the entry.

The Court: Well, he can if it is ambiguous at all. If it is apparently obvious on its face.

Mr. O'Malley: I think he would have no right to ask him any questions except such as are necessary to lay a foundation for the reception of the exhibit.

Mr. Ueland: Plaintiff offers in evidence, Plaintiff's Exhibit F.

Mr. O'Malley: May I be permitted to ask the witness a question?

The Court: Yes.

Cross-examination.

By Mr. O'Malley:

Q. Mr. Mattson, these entries were not made under your personal direction, were they?

A. Well, how do you mean that——

Q. I mean, did you ask the person that made these entries, to make them?

A. No, that is part of the clerk's duty.

Q. That is her general duty, in the bank?

A. Yes.

Q. And this is not part of any of the books of account of the bank, is it?

A. Why yes.

[fol. 74] Q. Well, you have books of account there, ledgers and journals and cash books, and all that sort of things, don't you?

A. We have a great many books—books to reflect every transaction of the bank.

Q. I know you have, but I don't mean books—when I say "record books" I mean merely record books, account books, books where accounts are kept. This is not part of those books, is it?

A. No, this is the collateral record.

Q. A separate record, and not part of the regular books of account of the bank, is it?

A. Well, it is a part of it, in that connection, that it is the collateral to the transaction.

Q. But it is not part of the ledger that you keep, in the bank?

A. No.

Q. Or your journal that you keep in the bank, is it?

Mr. Ueland: Objected to as immaterial.

The Court: I think I will let Mr. O'Malley bring out just what this is.

A. No.

Q. It is not part of your cash book, is it?

A. No.

Q. Or your day book?

A. Not unless it could be called a day book, that is, a record of the day's business. In the ordinary acceptance of the word "day book" it is not.

Q. The book out of which this is extracted is nothing except a record of collateral?

A. That is all. It is not extracted out of a book. It is a card record.

Q. It is not a part of any book then?

A. No, it is a card record.

Mr. O'Malley: It is objected to as incompetent and no foundation laid—not a part of the records.

The Court: It is a permanent record of the bank, kept in the usual course of business, isn't it, Mr. Mattson?

The Witness: Yes, Your Honor.

The Court: It may be received.

Mr. O'Malley: I would like to ask the witness another question.

Q. Calling your attention, on this Exhibit F, I would like to ask you what these dates are? They are not entirely [fol. 75] clear to me, in that column there. I take it they are dates? It is headed "date" and then there are figures under the date there, which would indicate some dates. What is the first date there?

A. Second month, fifth day, 1923 year.

Q. That would be the 5th of February?

A. Yes.

Q. What is the next one?

A. Third month, second day, 1923 year.

Q. That would be the 2nd of March?

A. Yes.

Q. And there are still some more on the same side, that refer to the same matter?

A. Yes, first month, 25th day, 1923.

Q. That would be January 25th?

A. Yes.

Q. And January 27th?

A. Yes.

Q. And the third date is the 5th of February?

A. Yes.

Q. And the last is the third of March?

A. Second of March.

Q. Second of March. Now when was this note received at the bank?

A. The second of March.

Mr. O'Malley: Now, Your Honor, I renew my objection. I would like to make a motion to strike this from the record, because it now clearly appears that the entries were not made at the time. The witness admits that the entry was made on the 25th of January; the next is on the 27th of January; the next is on the 5th of February; the collateral agreement was not executed and the assignment was

not made until the 2nd day of March, and his first answer, as I understood it, to counsel's question, was that these entries were made at the time of the transaction.

Mr. Ueland: It was descriptive of the general system. We are offering this particular exhibit now, showing the entry of March 2nd and the credit received, and also the general transactions, and I was laying the foundation for showing the general system employed by the bank in these records.

Mr. O'Malley: You concede then that no part of this sheet should be received in evidence except the one entry of March 2nd?

Mr. Ueland: Yes.

The Court: You are limiting the offer to that then?

Mr. Ueland: Yes. I will have to put in the whole document, of course.

[fol. 76] The Court: But it is offered merely for that one entry of March 2nd?

Mr. Ueland: Yes.

The Court: I think we will let it stand.

Mr. O'Malley: That is, it is in evidence only as to that one date there?

The Court: Yes, that is right.

(Plaintiff's Exhibit G and H marked for identification by the reporter.)

Direct examination (continued):

By Mr. Ueland:

Q. Who was this J. E. Jacobson you referred to?

A. Mr. J. E. Jacobson was a resident of the town of Dazey, North Dakota, and was engaged in the banking business.

Q. What was his connection with the banking business?

A. He was President of the Dazey State Bank.

Q. Was J. E. Jacobson, prior to and after March 2nd, 1923, a customer of the plaintiff bank?

A. He was.

Q. Was the Dazey State Bank, prior to and after March 2nd, 1923, a customer of the plaintiff bank?

A. It was.

Q. Did J. E. Jacobson, from time to time, borrow money from the plaintiff bank?

Mr. O'Malley: I don't want to object, but I don't think we want to waste any time on this question, that at the time of this transaction, Mr. Jacobson was heavily indebted, in as large a sum as $15,000.00, to this bank. That is not denied. It is admitted.

Mr. Ueland: I want to show subsequent advances.

The Court: Very well.

Mr. Ueland: Defendant will admit then that J. E. Jacobson on March 2nd, 1923, was indebted in a large sum of money to the plaintiff bank, in excess of $15,000.00?

Mr. O'Mallley: We do admit it in the answer.

Mr. Ueland: Will you admit that that indebtedness has not been paid?

Mr. O'Malley: I don't know whether it has been paid or not.

[fol. 77] Mr. Ueland: You also admit in the pleadings, that the Dazey State Bank was also indebted, do you not?

Mr. O'Malley: I think we do. You allege it in the reply, I think. I don't know whether we will admit that or not. Yes, we admit that Jacobson, in paragraph 4, and the Dazey State Bank, were each heavily indebted to the plaintiff, each in excess of $15,000.00, and that that indebtedness was past due at the time these papers were executed.

Q. Mr. Mattson, calling your attention to Plaintiff's Exhibits G and H, I will ask you to state what they are?

A. They are what is termed the liability record of the plaintiff bank, indicating the amount of money that J. E. Jacobson was owing *owing* at different times, or in other words, when loans were made, they were put on there, and when payments are made, they are credited, and the balance is shown.

Q. Will you please state what the bookkeeping system of the bank is, of showing loans made by your bank to its customers?

A. Well, I will just repeat what I said, that when we make a loan, we put it upon the liability card, and when there are payments made, there are credits made on it, and we strike the balances from day to day, showing as the card is termed, the liability of the borrower.

Q. These exhibits then, Exhibits G and H, are the original entries of loans made—contain original entries of loans made by your bank?

A. They do.

Q. And the entries are made in the due course of business?

A. Yes.

Q. Are they made contemporaneously with the loans indicated?

A. Yes.

Q. And these exhibits, are they just and true to the best of your knowledge and belief?

A. They are.

Q. Calling your attention to the name "J. E. Jacobson" at the top of each of these exhibits, I ask you if that refers to the J. E. Jacobson of Dazey, North Dakota?

A. It does.

Mr. Ueland: Plaintiff's Exhibits G and H are offered in evidence.

Mr. O'Malley: I don't think these are material. They are sheets showing the indebtedness of Jacobson, payments made, and so on. We admit that Jacobson and the bank were both indebted. I can't see the materiality of it. We admit that they are both indebted. It may be confusing to [fol. 78] the jury, having all these figures and dates in here, 1924 and 1925, going back as far as——

The Court: What is the purpose?

Mr. Ueland: I think we ought to be allowed to show what the true indebtednes of Mr. Jacobson was at the time of the pledge; also to show that there were subsequent advances made after the pledge.

The Court: I think I will receive them.

Mr. Ueland: The amount of the indebtedness might have a bearing upon the question of good faith, if it comes into this case, in receiving the collateral.

The Court: I think you would have the right to show the exact situation. I will receive them for that purpose.

Q. Now Mr. Mattson, please state what these exhibits G and H show with respect to whether or not the plaintiff bank made any loans to J. E. Jacobson atfer March 2nd, 1923, and refer to the particular entries.

Mr. O'Malley: Just a second please. You mean after when?

Mr. Ueland: March 2nd, 1923.

Mr. O'Malley: I don't see that that is material, whether they made loans to Jacobson after March 2nd, 1923.

The Court: Would the collateral agreement cover such a thing as that?

Mr. Ueland: We will introduce the collateral agreement in evidence.

The Court: Well, I think I will receive it. He may answer.

A. We made subsequent loans to Mr. Jacobson and his daughters, who were in school, and he was unable to finance the completion of their education. In September, each of the three of those girls, Emma, Helen and Dorothy, with their father's signature on the note, borrowed $150.00, and on January 7th each of them borrowed an equal amount, making the advances to Mr. Jacobson on account of the three girls $900.00, and the subsequent records indicate that renewals have been made of those notes from time to time.

Q. It is alleged in the answer, Mr. Mattson, that on March 2nd, 1923, the indebtedness of J. E. Jacobson and [fol. 79] the Dazey State Bank, to the plaintiff bank, which the defendant admits was in excess of $15,000.00 on the part of both J. E. Jacobson and the Dazey State Bank—I say, it is contended that that indebtedness was past due. Will you examine those exhibits again and see whether they show whether or not that was the case?

A. No, they were not past due.

Q. Will you state first with reference to J. E. Jacobson's indebtedness, whether it was past due on March 2nd, 1923?

A. No, the notes of J. E. Jacobson did not mature until the following December. You asked me about the indebtedness of the bank. I would have to pick out those several notes—there are several of them. It would take some time for me to do that. I haven't the exact description.

Q. Will you give me the liability ledger cards showing the Dazey State Bank's indebtedness to your bank?

A. (Papers produced by witness.)

(Plaintiff's Exhibit I, 3 sheets, marked for identification by the reporter.)

Q. I show you a number of cards, Mr. Mattson, which are marked "Plaintiff's Exhibit I," and ask you whether or not those are liability cards of the Dazey State bank?

A. Yes, they are.

Q. I will ask you whether those were kept by the plaintiff bank in the usual course of business, in the same manner as you testified concerning the liability cards of J. E. Jacobson?

A. They were.

Q. And the entries on these cards are just and true, to the best of your knowledge and belief?

A. They are.

Q. Now will you refer to Plaintiff's Exhibits G and H, being the cards showing the loans made by the bank to J. E. Jacobson, and state what his indebtedness to your bank was on March 2nd, 1923?

A. That is the other set of cards, isn't it? Your question now is on J. E. Jacobson personally?

Q. Yes.

A. The indebtedness of J. E. Jacobson on March 2nd, 1923 was $34,124.45.

Mr. Ueland: Plaintiff offers in evidence, Plaintiff's Exhibit I.

Mr. O'Malley: These, Mr. Ueland, have to do with the Dazey State Bank, don't they?

Mr. Ueland: Yes.

[fol. 80] Mr. O'Malley: No objection to Exhibit I.

The Court: Received.

Q. Will you refer to Exhibit I, and state what the indebtedness of the Dazey State Bank to the plaintiff bank was on March 2nd, 1923?

A. $46,727.57.

(Plaintiff's Exhibit J and K marked for identification by the reporter.)

Q. I show you two documents marked as Plaintiff's Exhibits J and K, and ask you to state what they are.

A. They are guarantees, from J. E. Jacobson, guaranteeing the indebtedness of the Dazey State Bank. One is for the sum of $5,000.00, dated May 3rd, 1917, which runs to the Scandinavian American National Bank, the former name of the Midland National Bank, and the other one is for the sum of $25,000.00, dated September 21st, 1921, to the Midland National Bank.

Q. Were these documents delivered to your bank on or about the days on which they are respectively dated?

A. Yes.

Q. Have these guarantees ever been revoked?

A. No.

Mr. Ueland: Plaintiff offers in evidence, Plaintiff's Exhibits J and K.

Mr. O'Malley: No objection.

The Court: Received.

(Plaintiff's Exhibit L marked for identification by the reporter.)

Q. So on March 2nd, 1923, Mr. Mattson, Mr. J. E. Jacobson was liable to the plaintiff bank for the indebtedness of the Dazey State Bank?

Mr. O'Malley: Objected to as calling for a conclusion of the witness. The guarantee shows what his liability was.

The Court: Sustained.

(Plaintiff's Exhibit M marked for identification by the reporter.)

Q. I call your attention Mr. Mattson, to the document which is signed by the Deputy Sheriff of Hennepin County, which document is marked "Plaintiff's Exhibit M" and ask you to state what that is.

[fol. 81] A. That is the Sheriff's certificate of sale of collateral.

Q. This document was delivered—was it delivered to your bank by the Sheriff of Hennepin County?

A. It was.

Mr. Ueland: Plaintiff offers in evidence, Plaintiff's Exhibit M.

Mr. O'Malley: Objected to on the ground that there is no foundation laid. The collateral agreement, I think, should be offered.

Mr. Ueland: Exhibit M withdrawn for the time being.

Q. Calling your attention to Plaintiff's Exhibit L, will you state what that is?

A. That is the collateral agreement signed by J. E. Jacobson on February 11th, 1921.

Q. Was this document delivered to your bank?
A. It was.
Q. Was it ever revoked?
A. It was not.

Mr. O'Malley: We would like to ask the witness a question about this collateral agreement.

Mr. Ueland: Well first, Plaintiff offers in evidence, Plaintiff's Exhibit L.

Mr. O'Malley: Where was this collateral agreement executed by Mr. Jacobson?

The Witness: In the bank?

Mr. O'Malley: Here in Minneapolis?

The Witness: Yes, in our bank.

Mr. O'Malley: That is all.

The Court: Received.

Mr. Ueland: Plaintiff renews the offer of Plaintiff's Exhibit M, in evidence.

Mr. O'Malley: I object to the notice of sale, on the ground that it is a departure from the pledge.

(Argument of counsel.)

The Court: I think I will receive it.

Q. Mr. Mattson, I call your attention to the last page of Plaintiff's Exhibit M, the next to the last paragraph on [fol. 82] that page, wherein the two promissory notes of Oscar Mosher and Sophia Mosher of $5,000.00 each are described, and reference is also made to the policy of the Dakota Life Insurance Company, securing those notes. I will ask you whether or not the notes and policy therein referred to are the notes and policy already in evidence in this case.

A. They are.

(Afternoon session.)

Mr. Ueland: Do Your Honor's notes show whether Exhibits D and E were received in evidence?

The Court: Were those the two $5,000.00 notes?

Mr. Ueland: Yes.

The Court: Yes, that is what I have. If they were not received, they may be received now.

Q. Mr. Mattson, you testified this morning that after March 2nd, 1923, your bank made some further loans to J. E. Jacobson. Will you state whether such further loans were made by your bank in reliance upon the collateral which your bank then held from J. E. Jacobson, including the two Mosher notes of $5,000.00 and the insurance policy purporting to secure the same?

Mr. O'Malley: Objected to as irrelevant to any issue in this case, particularly for the reason that as I recall the testimony, the record shows that prior to the time that these loans were made on account of the daughters, the property had been sold under this pledge agreement. If I am in error in that, I would like to have Mr. Ueland correct me.

The Court: You do not mean advances made after the collateral was foreclosed, do you, Mr. Ueland? What is the date of the sale?

Mr. Ueland: The foreclosure sale was on the 23rd of June, 1923.

The Court: The 23rd of June, 1923?

Mr. O'Malley: And when did he testify the advances were made on account of the daughters?

Q. Will you tell us that, Mr. Mattson?

A. As I remember, it was in September and the following January.

Mr. O'Malley: Of what year?

The Witness: The same year.

[fol. 83] Mr. O'Malley, September, 1923?

The Witness: Yes, and January, 1924. That would be after that foreclosure.

Mr. O'Malley: Those are the only advances you have testified about, being made after the notes and the policy were assigned?

The Witness: They are.

Mr. O'Malley: We object to that——

Mr. Ueland: I think his point is probably well taken.

The Court: Sustained.

Q. Mr. Mattson, showing you the two $5,000.00 notes again, Plaintiff's Exhibit D and E, will you please state whether or not your bank has ever received any payment on those notes or either of them?

A. It has not.

Mr. Ueland: You may cross-examine.

Cross-examination.

By Mr. O'Malley:

Q. As I understand the situation it is this, is it not, that these two $5000.00 notes, together with this insurance policy, were both assigned to your bank as collateral security by one J. E. Jacobson—is that correct?

A. Did you say "assigned" or "signed"?

Q. Assigned?

A. Yes, assigned as collateral security.

Q. That is, in other words, no money was paid or advanced by you and by "you" I mean your bank, to Mr. Jacobson or anyone else in his behalf, at the time that these two notes were endorsed by him over to your bank?

Mr. Ueland: Objected to as incompetent and immaterial —not proper cross-examination.

The Court: Overruled.

A. There was nothing additional at that time.

Q. And the same is true as to the insurance policy, is it not?

A. Yes.

Q. And they were simply left there with you as collateral security for indebtedness owing by Mr. Jacobson to your bank, but the indebtedness was not yet due at that time, was it?

A. I think I testified that his own notes were not due.

[fol. 84] Q. None of his notes were due at that time, were they?

A. His notes?

Q. Yes.

A. No, I think not.

Q. And at the time that the notes and the policy were assigned to your bank, there was no collateral agreement executed between you and Mr. Jacobson, was there?

A. Yes; that was introduced here.

Q. What?

A. That has been introduced here.

Q. The one introduced is dated in February, 1921——

A. Well, that is two years prior, isn't it?

Q. Yes, but I say, at the time these two notes and the policy were assigned to your bank, was there any separate collateral agreement covering those, executed by you and Mr. Jacobson?

Mr. Ueland: Objected to as immaterial. He has testified that that was the collateral agreement in force.

The Court: I think I will permit him to answer the question.

A. There was nothing additional taken at that time.

Q. So the only collateral agreement you claim these two notes and the policy under is the one in evidence—is that correct?

A. Yes.

Q. Dated February 11th, 1921?

A. Yes.

Q. Now at the time that these notes and the policy were assigned to your bank by Mr. Jacobson, was there any of the Dazey State Bank indebtedness due to your bank, which had been guaranteed by Mr. Jacobson?

A. Yes, all of it.

Q. That was all past due at the time that the policy and the notes were assigned to your bank?

A. Well, without going to look up the record, I answer "yes", because the bank had closed its doors. It had become insolvent, and all of it had matured by reason of that if for no other reason. I could look up the dates and check it back.

Q. Well, when did the Dazey State Bank close its doors?

A. In February. I think it was the 26th of February, in 1923—yes—it was in the same year, 1923, February 26th.

Q. That is, the Dazey State Bank of Dazey, North Dakota, became insolvent and its doors were closed at the date you just mentioned?

A. Yes.

Q. And by reason of that fact, you claim that that matured the notes?

[fol. 85] A. Yes; the notes may have been due otherwise. I have not looked it up.

Q. Can you look it up and tell us how many of the notes were due by their terms on March 2nd, 1923?

A. I can look it up. I don't know just how many it will take to identify the notes that were in existence, but I think I can get it for you quite readily. Some of the notes were payable on demand. For instance, there is a note here—I see that just prior to the time of that cut-off there was one here of $20,000.00 payable on demand, and another of $3,000.00; and one of $2,344.00. That makes $25,000.00 of it right there. I would have to have some time to give you the exact information, but the bulk of the notes were payable on demand.

Q. No demand had been made though, by your bank, prior to the time that the Dazey State Bank closed its doors, had there?

A. Well, I don't know just what you mean by "demand". We were trying to collect all the time, but we could not get it.

Mr. O'Malley: That is all.

Mr. Ueland: Plaintiff rests.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Hanton: The defendant in this action will try and present to you the following facts, as its defense to the plaintiff's claim. The first matter that I want to call your attention to is that we will show that the third premium was not paid.

Mr. Ueland: We object to that, Your Honor, because under the pleadings there is no such defense raised.

Mr. Hanton: In our pleadings, if the Court please, it appears and ought to appear from their own complaint, that the last premium payment was extended, and the time of extension of the premium payment was after the death of the insured and the premium payment was never paid, and the defendant is entitled, if the plaintiff is entitled to recover at all, to the amount of the last premium payment that had not been paid.

Mr. Ueland: Well, Your Honor, before we go into that I think we should consider the pleadings. Paragraph 14 of the amended complaint reads as follows:

"That up to the time of the death of said Oscar Mosher, all premiums which accrued on said policy were paid on or [fol. 86] before the times agreed upon by and between said

Oscar Mosher and defendant; that the time for the payment of the premium of $394.20 originally due on said policy on November 28, 1922 was, by written agreement, entered into between said Oscar Mosher and defendant on November 27, 1922, and in consideration of the sum of $118.26 and the further sum of $16.56 as interest paid to defendant, extended for one year; that said agreement provided that in the event of said Oscar Mosher's death within said period of extension, the sum insured should be paid subject to deduction of said premium of $394.20 originally due on November 28, 1922 and that said sum of $118.26 should in that event be repaid."

In other words, we set forth an agreement extending the time of payment of this premium, and agreeing that if he dies within the year, that premium is to be deducted, but the consideration for the extension is to be paid with the policy, and the demand for relief is on that basis. Paragraph 14 of the amended complaint simply is not denied in the answer.

The Court: I think we better pass that for the time being. If you want to offer any proof later on——

Mr. Hanton: We will offer proof as part of our defense, that the premium was not paid, and the policy provides that it shall be paid in full at the anniversary date of the policy.

The Court: Your contention is that that is not in issue, under the pleadings?

Mr. Hanton: Of course, I may be mistaken, but as I remember the pleadings, that is a matter that is denied. That is not denied, but the plaintiff admits that it is not paid.

Mr. Ueland: There is no general detail in the answer.

Mr. Hanton: Under their pleadings, they admit it was not paid.

Mr. Ueland: We admit the extension agreement, and that he died within the year.

Mr. Hanton: Yes, but the premium was due, and the extension agreement amounts simply to this, that the whole premium must be paid, and the amount paid in advance or part payment would have to be credited on that amount.

[fol. 87] The Court: That would be true if you had not made the agreement to extend the time of payment, but

according to the theory of the plaintiff, as I understand it, you did extend the time of payment, and they are owing you a deduction for the amount of the premium that was not paid.

Mr. Hanton: That is the point I want to call the jury's attention to, that we will show that.

Mr. Ueland: Well, I do not want you to call anything to their attention that is not in issue.

The Court: I think you better eliminate that for the present and if there is an offer of proof, we can take that up later.

Mr. Hanton: The defendant in this case will also show to you that this condition exists as to this policy, and we will show that from court records, the findings of fact and conclusions of law and the judgments rendered in the District Court of the State of North Dakota in the County of Cass, that this policy was cancelled by judgment of the Court, for the reason that this policy was obtained under representations which were not true; that this policy never took effect, for the same reason that the policy was cancelled by the Court, and that there was nothing that was due and coming to Oscar Mosher; neither was there anything due or payable to the estate of Oscar Mosher, and that this judgment was rendered, and we will show that condition of facts to exist. We will also show to you by the evidence that we intend to offer, that this obligation that the plaintiff claims in this action, to the amount of $10,000.00 against Oscar Mosher and Sophia Mosher, is nothing but a paper claim; that there was no consideration in any way, shape or manner, given by Oscar Mosher, or given by J. E. Jacobson or anybody, to Oscar Mosher or to Sophia Mosher, for the making of these two notes. We will show to you that these two notes were secured by a trick, by deception practiced upon Oscar Mosher and Sophia Mosher, in this way; that an annual settlement with the Dazey State Bank of Dazey, North Dakota, was being made, by a representative of the Midland National Bank and by an officer of the Dazey State Bank, between the Dazey State Bank and J. E. Jacobson and the Moshers, Oscar Mosher and Sophia Mosher, his wife. We will show to you that in that settlement there were three notes made, and security by chattel mortgage was given for

every note, one note being for $1,500.00, and a chattel mortgage corresponding with the note, as security for the [fol. 88] payment of that $1,500.00. This transaction occurred on the 13th day of January, 1923. That this note was delivered at that time; that this note was afterwards assigned to the First National Bank of Fargo, North Dakota; that this note was paid by the Moshers. We will show to you that there was another note of $2,010.00 and some cents, given also by the Moshers in this settlement and a chattel mortgage was given to secure the same; that this $2,010.00 note was given to the Dazey State Bank of Dazey, North Dakota; that this note was transferred at the time the Dazey State Bank failed, or shortly before that time—at or about that time, was transferred and endorsed to the Midland National Bank, and that note is not paid. We will show to you also that the Midland National Bank has filed their claim and demanded payment from Sophia Mosher who is administratrix of the estate of Oscar Mosher, and also a personal signer on that $2,010.00 note—demand has been made, and that is all that has ever been demanded of Sophia Mosher as administratrix of the estate of her husband and as against herself. We will also show to you correspondence of the Dazey State Bank, relating to that settlement of all the claims that J. E. Jacobson and the Dazey State Bank had against the two Moshers, Oscar Mosher and Sophia Mosher—correspondence which stated that all that was due and had not been signed up—the notes had not been signed up—had been computed and the note was not signed, or the note was sent out with this letter, saying that the balance of the indebtedness against the Moshers, to J. E. Jacobson and the Dazey State Bank was the sum of $682.00, and asking them to sign that note. This note was signed and returned to the bank, subject to that demand made by the bank to finish up renewing the papers, and making the settlement complete. This note today is in the hands of the Banking Department of the State of North Dakota, Division of Closed Banks, of the State, and a demand has been made for its payment. We will also show to you that at the time that this final settlement was made relative to these notes, there was another note made, completing this settlement at that time, on any indebtedness of Oscar

Mosher and Sophia Mosher to J. E. Jacobson and the Dazey State Bank, by making a note to J. E. Jacobson for $1,646.00, and chattel mortgage security was given to secure the payment of that note; that this note has not appeared in anybody's possession, and so far as Mrs. Sophia Mosher, as administratrix of the estate of her husband and herself, is concerned, she does not know where that note is. No one has produced it. It has gone somewhere. At any [fol. 89] rate, the Midland National Bank has made no claim that it holds or owns that note. We will show that at the time this settlement was made, on the 13th of January, 1923, at the home of Oscar Mosher, who was then sick—right there in their own home—we will show to you that there was no conversation about any $5,000 notes, and that if the two notes were made, they were made without calling the attention of Oscar Mosher and Sophia Mosher to those notes. We will show to you that the only conversation about any indebtedness was the indebtedness for which notes were given, the four notes I have mentioned and the last one that the bank asked for in order to complete all that they had against the Moshers; that is, the $1,500.00 note, the $2,010.00 note and the $1,646.00 note. Those were the three notes that were signed; and also one for $682.00 going to the North Dakota Department; that nothing was said in that conversation in any way, shape or manner—no attention was called to any claim of an additional $10,000.00—two $5,000.00 notes; that in signing all of these papers, the notes and the chattle mortgages which we will present to you, or authenticated copies, that all those matters were called to their attention; they were discussed and the papers were brought there already made out, and the papers were signed, and that no papers were written up at that time. They were simply signed there by the Moshers. We will show to you that those two notes must have been signed at that time. We wil show to you that that was the only time they could have been signed, and that the signing of them was a matter of trickery. We will show to you that so far as the making of these notes is concerned, these two $5,000.00 notes, by their own representative there at that time, that he considered these two notes of no account. How they secured the signatures—the only living witness that we have is the wife of Oscar

Mosher—her testimony will show to you that she does not know. We will show to you also that there was no indebtedness amounting to $10,000.00 that these supposed notes were to represent, either on Oscar Mosher's part or on her part. We will show to you that there was nothing paid in any way, shape or form, to Oscar Mosher or Sophia Mosher, for the signing of these notes, when all of these papers were signed there at their home. We will also show to you by this record in evidence, that Oscar Mosher died—also by oral testimony—in September, 1923; that he died of consumption; that he was afflicted by that disease, according to the settled record—according to the [fol. 90] Court record—afflicted with that disease when the policy was applied for and issued by the company.

Mr. Ueland: I don't think that is in issue.

Mr. Hanton: No it is not, but the record reveals it, and we base our defense upon that record. The evidence shows an indebtedness, which we will show to you, on the part of the Moshers to the Dazey State Bank and J. E. Jacobson, of somwhere around $5,600.00 all told, and all secured by the personal property of the Moshers. One note has been paid. The $1,500.00 note has been settled with the First National Bank of Fargo. One note is lost. No one has made any claim on it. That is the $1,640.00 note. Two notes are not paid. The $2,010.00 note is held by the Midland National Bank. The $682.00 note is held by the Receiver of Closed Banks of the State of North Dakota. That is the main thing that I want to call your attention to; and that is, that our evidence will show that these claims of the Midland National Bank, involving $2,010.00, and this claim of the Banking Department of North Dakota, involving $682.00, are the only claims made against Sophia Mosher as one of the signers of said notes, and also the party that gave the chattel security for the payment of the said notes.

Mr. Hanton: The defendant will call Mr. Matson to the stand as an adverse witness, for the purpose of cross-examination.

EDGAR L. MATTSON, Previously sworn, recalled by the Defendant as an adverse witness, for cross-examination, testified as follows:

Cross-examination.

By Mr. Hanton:

Q. Mr. Mattson, did you have any personal dealings relative to the business transactions between the Midland National Bank and the Dazey State Bank or J. E. Jacobson?

A. Yes, I did.

Q. Were you ever out in North Dakota to look after the collateral that you held according to your exhibits here, and the collection thereof?

A. Particularly the Dazey collateral, you are speaking of?

Q. Yes.

A. No.

Q. Who looked after the collections on the collateral notes that you held, for the payment of the Dazey State [fol. 91] Bank obligations to the Midland National Bank, or for the payment of the obligations of J. E. Jacobson to the Midland National Bank?

A. Primarily, Mr. Sharp, our assistant cashier, who had men under him—I can't say just how many—but the principal man was Mr. Neal, under Mr. Sharp.

Q. Will you please give us the initials of Mr. Neal?

A. C. B., I believe.

Q. C. B. Neal?

A. Yes.

Q. And was he in charge of the collections of the paper you held as collateral to the indebtedness of the Dazey State Bank or J. E. Jacobson?

A. Yes.

Q. How long was he out there in that territory, for that purpose?

A. I can't say. It was quite a while. He has represented us there and elsewhere for some time.

Q. Was he there in the winter of 1922-1923?

A. Part of it at least. I don't know that he was there constantly. He handled collections for us at other points also.

Q. Did you have any information that the notes were signed, being the two notes of $5,000.00 each, at the time that it occurred?

A. No.

Q. From no one?

A. No.

Q. Did you have any correspondence with Mr. Neal about the signing of these notes?

A. No, I think not. I remember nothing.

Q. At the time that the $2010.86 note was sent in, how was your attention called to it, or did you have personal knowledge or notice that that note came into the bank as collateral?

A. I can't say that I did.

Q. You can't say that you did?

A. No. As a rule, when collateral comes in, I turned it over to the junior men. I don't pay much attention to it, unless it is some particular transaction.

Q. This $2010.00 note however is now in your bank, is it not?

A. Yes.

Q. And are you familiar with the security that was given for the payment of that note?

A. Not personally. I have been told that is of doubtful value, if it has any value at all.

(Defendant's Exhibit 1 marked for identification by the reporter.)

Q. Have you ever seen the original or a copy of the security that is part of that $2010.00 obligation?

[fol. 92] A. No, I think not. I don't remember.

Q. C. B. Neal appears at a witness on Exhibit 1, to the execution of the chattel mortgage made by Sophia Mosher, to the Dazey State Bank, a Corporation, at Dazey, Barnes County, North Dakota. Is that the Neal that you say was working for the bank, and one of the officials of the bank?

A. It is the same name and initials. That is merely typewritten. I can't say.

Q. You can't say?

A. I assume that it is.

Q. You have not got the original of that here, that chattel mortgage?

A. No, I have not. It may be in the bank's files.

Q. Did you, at the time that this policy was transmitted to you with the assignments—did you receive them personally or by mail?

A. By mail.

Q. You are not positive that you received that assignment on the 2nd day of March, 1923, by mail, are you?

A. Well, as positive as I could be, yes. The record shows that we received it that day, on the collateral record. That is all I know.

Q. You did not see it yourself?

A. Why, I am not even sure that I was there at the time.

Q. No?

A. It may have come in—so far as my recollection is concerned——

Q. Then when you testified that this Exhibit C was received at your bank on the 2nd day of March, 1923, you simply testified from the record—that is all, is it not?

A. Yes.

Q. You don't know whether it came in that day, or subsequent thereto?

A. Well, it may have come before—it could not have come after.

Q. It might have come in before?

A. It might have been in a day before. It is possible.

Q. You are not sure but that it might have come before?

A. No, you asked if it could have. Sometimes there is so much work that we cannot do it all in one day, and it occurs that possibly the clerk may have recorded it the following day. That is possible.

Q. Now I have noted, on Exhibit C, the endorsement there that was made by an officer of the Dakota Life Insurance Company on the 2nd day of March, 1923, have you?

A. What was that?

[fol. 93] Q. By examining Exhibit C, you see that that endorsement was made March 2nd, 1923, by an officer of the Dakota Life Insurance Company?

A. Yes, that is what it says there.

Q. And you also say that so far as your personal knowledge goes, you do not know when it was received?

A. I have no recollection of the time it was received.

Mr. Hanton: That is all.

Redirect examination

By Mr. Ueland:

Q. I believe you testified, Mr. Mattson, that Mr. C. B. Neal was in charge of collecting the collateral securities which your bank held for the indebtedness of the Dazey State Bank and J. E. Jacobson. When you testified that he was in charge, what did you mean by that?

A. We would send the papers to him to look after them, and to collect all that he could collect, and renew where it was necessary.

Q. You mean he was acting as the field collector for the bank, under the supervision of the officers of the bank—is that correct?

A. Yes.

Recross-examination

By Mr. Hanton:

Q. Did you have anybody else doing any collecting on collateral that had been endorsed to you by the Dazey State Bank or by J. E. Jacobson, excepting C. B. Neal?

A. I can't answer that. We had a great many collectors, and it may be that we had others, and it may not. We had a whole force of collectors covering Minnesota, North Dakota and Montana.

Q. You remember when this bank closed, that you obtained a lot of paper, notes, from the bank, did you not?

A. When it closed?

Q. Or before it closed?

A. You mean that we got additional collateral?

Q. Yes, additional collateral.

A. I think there was some additional collateral.

Q. Do you remember the total amount of the collateral that you had for the payment of the Dazey State Bank obligation to your bank?

A. No I do not.

Q. Did it amount to $145,000.00 in the shape of paper that you held as collateral?

A. Well, I can't say. Sometimes the figures on collateral will be awfully large, but what we realize out of it is very little.

[fol. 94] Q. Well, do you remember that paper, the collateral, and how much was the face value?

A. I can't tell you.

Mr. Hanton: That is all.

Mr. Hanton: We will call Clarence B. Neal.

CLARENCE B. NEAL, a witness called by the defendant, being first duly sworn, testified as follows:

Direct examination

By Mr. Hanton:

Mr. Hanton: Mr. Neal is called for the purpose of cross-examination, as an officer of said bank and as the managing agent of said bank.

Mr. Ueland: We object to the calling of the witness for cross-examination under the statute, on the ground that the witness is not the managing agent and never was the managing agent of the plaintiff bank, and also that he is not now employed in any way by the plaintiff bank. At the time that he was employed by the plaintiff bank, plaintiff's contention is that he was a collector.

The Court: I do not believe there is sufficient to show that this man was a managing agent. Sustained.

Q. Your name is Clarence B. Neal?

A. Yes.

Q. Were you with Rudolph Jacobson at the home of Oscar Mosher and Sophia Mosher on the 13th day of January, 1923?

A. Yes, I was.

Mr. Hanton: The witness is shown Defendant's Exhibit 1.

Q. You may examine that exhibit and state if you attached your signature as a witness to the original at the time it was signed.

A. I did.

(Defendant's Exhibits 2 and 3 marked for identification by the reporter.)

Mr. Hanton: The witness is shown Defendant's Exhibit 2.

Q. Are you the C. B. Neal who signed as a witness, the original chattel mortgage given by Sophia Mosher to secure the payment of $1,646.49, to J. E. Jacobson, on the 13th day of January, 1923?

A. Yes.

Mr. Hanton: The witness is shown Defendant's Exhibit 3 and asked this question:

[fol. 95] Q. You may examine that and state if you are the party who signed as a witness the original of which this is a copy, and put your signature down on the left-hand side of the signature of Sophia Mosher on the 13th day of January, 1923?

A. Yes.

Q. Do you remember that this mortgage was for the amount of $1,500.00, or to secure the amount of $1,500.00?

A. Yes.

Q. Do you remember getting those three notes signed at that time, by Oscar Mosher and Sophia Mosher, for which Defendant's Exhibits 1, 2 and 3 were made to secure the payment thereof?

A. Yes.

Q. Were any papers written out at that time in the home, or were they simply signed?

A. Signed.

The Court: You mean they were in blank when they were signed?

The Witness: No. The papers were written up before, Mr. Jacobson wrote up the papers.

Q. Where were the papers written up?

A. Well, I can't say for sure. The papers were given to me by Mr. Jacobson.

Q. You had been in the employ of the Midland National Bank, now the Midland National Bank and Trust Company, for some time prior to that time, had you not?

A. Yes, I had.

Q. Under what officer were you operating, or who gave you the directions for your work?

A. Mr. J. H. Sharp, the Assistant-Cashier.

Q. How long had you been working in the field around there, on the Dazey State Bank paper, for the Midland National Bank?

A. You mean how long before February 13th?

Q. Yes—January 13th.

A. I think about 60 days.

Q. And did you continue to work there as a representative of the Midland National Bank up to the time that the bank closed?

A. Yes.

Q. Did you write up any of these papers yourself?

A. No.

Q. Did you at that time, or shortly thereafter, before the bank closed, obtain this $2,010.86 note for the Midland National Bank, as collateral security?

[fol. 96] A. I obtained it, not at that time but before the bank closed.

Q. Was that the only note that you obtained for the Midland National Bank out of the three notes that are described in Defendant's Exhibits 1, 2 and 3?

A. That is the only one.

Mr. Hanton: You may cross-examine.

Cross-examination.

By Mr. Ueland:

Q. You gave some testimony to the effect that for about 60 days prior to January 13th, 1923, you were in the vicinity of Dazey, collecting the Dazey paper for the Midland National Bank. Did you mean by that, that you were collecting the paper which the Dazey State Bank had pledged to the Midland National Bank? Is that the paper you referred to?

A. Yes.

Q. Some reference was made to a Mr. J. H. Sharp, the Assistant-Cashier of the Midland National Bank, under whom you were working and to whom you were reporting. My understanding is that Mr. Sharp is no longer in the employ of the plaintiff and is now in Des Moines, Iowa. Do you know that to be a fact?

A. I do.

Mr. Ueland: That is all.

(Defendant's Exhibit 4 marked for identification by the reporter.)

Mr. Hanton: Defendant offers in evidence, Defendant's Exhibit 4.

The Court: What is it?

Mr. Ueland: I imagine it is an authenticated transcript of certain court records, in North Dakota. It is rather long and I would like to read it.

The Court: We will take a ten minute recess.

(Afternoon recess.)

Mr. Ueland: Plaintiff objects to the admission in evidence of Defendant's Exhibit 4, on the ground that it is immaterial and irrelevant.

(Argument of counsel.)

(Adjournment to October 10th, 1925 at 10 A. M. at which time further proceedings were had.)

(Argument of counsel).

[fol. 97] The Court: Well, it seems to me that this record which is offered here would be of no force and effect whatever, as against the plaintiff in this action. The plaintiff was not required to come into the jurisdiction of the North Dakota court and litigate that matter, and it seems to me that the whole thing, so far as the plaintiff is concerned, stands exactly as it was before the action was ever brought; that is, so far as the purposes of this suit are concerned. Therefore, I will sustain the objection to the admission in evidence of the evidence that has been offered. (Defendant's Exhibit 4.)

Mr. O'Malley: May we have an exception noted in the record?

The Court: Yes.

Mr. Hanton: The defendant will call Mrs. Sophia Mosher.

Sophia Mosher, a witness, called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hanton:

Q. State your name.
A. Sophia Mosher.

Q. Will you please speak loud enough so that the jury can hear you?

A. Yes, sir. Sophia Mosher.

Q. Where do you now reside?

A. I reside at Dazey, North Dakota.

Q. How long have you lived at that place?

A. For the past 26 years.

Q. Are you the widow of Oscar Mosher?

A. Yes.

Q. Do you live on a farm near Mosher, or at Mosher?

A. I don't just understand you.

Q. I mean, do you live at Dazey, out of Dazey, on a farm?

A. Yes.

Q. All the time you have lived on the same place?

A. All the time.

Q. Are you acquainted with C. B. Neal?

A. Yes.

Q. And also Rudolph Jacobson?

A. Yes.

Q. Also with J. E. Jacobson?

A. Yes.

[fol. 98] Q. Do you remember Rudolph Jacobson and C. B. Neal coming to your place on the farm on the 13th day of January, 1923?

A. Yes.

Q. About what time of the day was it when they came there?

A. About nine or ten.

Q. About how long did they stay there?

A. Oh, a half or three-quarters of an hour, I should judge.

Q. Was Mr. Mosher up at the time?

A. Yes.

Q. Were any papers written out at your home on that day?

A. No.

Q. Were any papers signed on that day by Mr. Mosher and yourself?

A. Yes.

Q. Were you present when the papers were signed by Mr. Mosher and yourself—were you present at that time when Mr. Mosher signed the papers?

A. Yes.

Q. You were present?
A. Yes.
Q. What was said if anything, about the papers that were brought there?

Mr. Ueland: Just a minute——
Q. (Continued) In your presence.
Mr. Ueland: May I examine the witness just a minute?
Mr. Hanton: Yes

Cross-examination.

By Mr. Ueland:

Q. Mrs. Mosher, were you here yesterday in the court-room?
A. Yes.
Q. Did you hear what Mr. Hanton said about what he would try to prove, in his statement to the jury? Did you hear Mr. Hanton's remarks to the jury?
A. Yes, I heard him talking.
Q. Did you hear him say that a note of $1,500.00 was signed by your late husband and yourself, in favor of the Dazey State Bank?
A. Yes.
Q. And did you hear him say that that note had gone to the First National Bank of Fargo?
A. Yes.
Q. And you heard him say that the note had been taken up by you as administratrix, did you not?
A. Yes.
[fol. 99] Q. Did you hear Mr. Hanton say, as I recall that he did, that the $10,000.00 insurance policy on the life of your late husband, was assigned to the Midland National Bank, that is, the plaintiff in this action, and that he would show to the jury that that assignment was given to secure this $1,500.00 note and other notes, or was intended to secure it?

Mr. Hanton: Objected to, if the Court please, in that it is not stating the statement that I made.
The Court: What is the purpose of this, Mr. Ueland?
Mr. Ueland: I wish to show that the witness has acquired the note which the defendant claims was secured by the assignment. Let me ask one more question.

Q. You know this is a suit in which the bank is seeking to recover the insurance money on that $10,000.00 policy, do you not?

A. Yes, I do.

Q. Now recalling that you are under oath, will you state to the Court what part of that insurance money you are to have if the bank does not recover it in this action?

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Hanton: Objected to, if the Court please, as improper examination.

The Court: Yes, I think that is improper at this time. I think we will let the cross-examination cease.

Mr. Ueland: I am trying to show the interest of the witness.

The Court: Yes, I know, but that can be done on cross-examination.

Mr. Ueland: I would like to show whether she is competent to testify.

The Court: She would be competent, whether she was to get any money or not. It will go to the jury, to determine the weight of the testimony.

Mr. Ueland: But as I understand, under our statute, if she is interested in the event of the action, she cannot testify to conversations with deceased persons.

The Court: Well, so far, I think there has been nothing of that kind attempted.

Mr. Ueland: Yes, but this question is as to what was said.

The Court: Well, I don't get your point on that.

[fol. 100] Mr. Ueland: I have not made my objection yet, of course.

The Court: Well, you may proceed then.

(Last question read by reporter.)

A. Nothing.

Q. Nothing?

A. Nothing.

Q. Does the estate of your husband—is the estate of your husband, of which you are administratrix, to have any part of this insurance money if the plaintiff does not recover it in this action?

Mr. Hanton: Objected to as improper examination as to the qualifications of this witness. It is proper for cross-examination, if anything.

The Court: Objection overruled.

Mr. Hanton: Exception.

A. No.

Mr. Ueland: The plaintiff objects to this witness testifying as to any conversations with or in the presence of her late husband, Oscar Mosher, on the ground that such testimony is incompetent under the statute, as testimony or conversation with a deceased person, the plaintiff contending that the witness is interested in the event of the action, in the first place, because she has shown her interest by attempting to intervene in the action. To be sure, her petition in intervention was denied, but the denial was on the ground that under the federal practice interventions in suits of common law are not permitted. In the second place, the witness appears to be a co-signer of the notes which are involved in this controversy, Exhibits E and F, and has an interest in the event of this action as effecting her liability on those notes.

The Court: There is no way that she would be directly affected by the outcome of this suit, is there?

Mr. Ueland: Not directly, no. I want to add to my objection—also objected to on the ground that it appears from the question and from the pleadings, or from the question taken in connection with the pleadings, that the defendant is about to show the matter of the alleged fraud, and is attempting to show the equities of third parties to this litigation.

[fol. 101] (Argument of counsel).

Mr. Hanton: I contend that we have a right to go into that question with Mrs. Mosher, both as to the trickery and fraud used in procuring her and her husband to sign these two $5,000.00 notes, and also the question that there was no consideration paid by the Midland National Bank or Jacobson to either Mr. or Mrs. Mosher for those two $5,000.00 notes.

The Court: The question with me is as to how far you can go with this fraud charge. What you did was to issue a $10,000.00 policy to Mosher. So far as the Midland National Bank is concerned, that policy has never been cancelled and is still in force and they hold what purports to be at least, a perfectly valid assignment of it. How far you can put yourselves in Mosher's position and take advantage of things which they claim happened, is very questionable in my mind. Now so far as you are interested in seeing that nobody else recovers this same amount from you against, you have a right to know that there was an assignment here which would protect you in paying the $10,000.00 under that policy. If it were not for that, I suppose you would have no interest in it.

Mr. Ueland: Defendant has already shown by offer of proof, that it is protected in North Dakota as against any claim by the Moshers.

Mr. Hanton: Does the Court hold that this witness is not qualified to testify as to the transaction?

The Court: No, I have not ruled on that. I said the thing that interested me most was the question of whether you could prove what you wish to prove by this witness—whether she was competent to testify or not—whether it had any bearing upon this case.

Mr. Hanton: On the last objection that he made?

The Court: Yes.

Mr. Hanton: Then as I understand—

The Court: It seems to me, the way to shorten it up would be to make your offers of proof, and then that would protect your record.

Mr. Hanton: That is the way I understood the Court. Will the Court permit us to make the offer orally in Court, or in writing?

[fol. 102] The Court: Whichever way you prefer. If you prefer to make it in writing, after we know in a general way what it is going to be, then there would be no difficulty with the record.

Mr. Hanton: I probably can make it in writing, what we offer to prove by this witness—I mean, orally, in Court. We offer to show by the witness here on the stand, that at the time the notes were signed, there was a reference made

to renewing the paper for the coming year, on the obligations that existed on the part of Oscar Mosher and Sophia Mosher to the Dazey State Bank and to J. E. Jacobson, and that there were at that time, papers written out and submitted to them for signature, including Exhibit 5.

(Defendant's Exhibit 5 marked for identification by the Reporter.)

Mr. Hanton: (Continuing)—being the note for $1,500.00 dated January 13th, 1923, payable to the Dazy State Bank, signed by Oscar Mosher and Sophia Mosher; that the same was afterwards endorsed by the Dazey State Bank, by J. E. Jacobson, President, and afterwards again endorsed by the First National Bank of Fargo, North Daktoa, by E. V. Bassett, and afterwards endorsed "pay to the order of Ed Ladbury without recourse," and that said note was settled for and paid by this witness. We also offer to show that at the same time there was a chattel mortgage executed to secure the payment of this note, dated on the same day, due October 15th, 1923, and describing the crop to be raised on the said premises during the said year of 1923, witnessed by C. B. Neal and R. C. Jacobson, which mortgage was filed on the 19th day of January, 1923 at 9:05 o'clock A. M. in the office of the Register of Deeds of Barnes County, North Dakota; the same being duly authenticated as to being a copy. We also offer to show that at the same time there was a note executed for the sum of $2,010.86 to the Dazey State Bank, and that the same was signed by Oscar Mosher and Sophia Mosher, due October 15th after date, and endorsed by the Dazey State Bank, and that there was a chattel mortgage made to secure the same, at the same time, on the 13th day of January, 1923, to secure the payment of said $2,010.86 note, on a lot of machinery, and witnessed by C. B. Neal and R. C. Jacobson, which was filed on the 29th day of January, 1923 in Barnes County, North Dakota. The same will be offered as an exhibit, duly authenticated copies, with the witness' testimony. We offer to show also that at the same time, there [fol. 103] was a note made for $1,646.49, signed by Oscar Mosher and Sophia Mosher, payable to J. E. Jacobson, at Dazey, North Dakota, and secured by machinery, personal property, and also the crop for the year 1923, to be raised, and that the same was filed on the 2nd day of Feb-

ruary, 1923 at 9:04 o'clock A. M. in the office of the Register of Deeds of Barnes County, North Dakota, this being marked as Exhibit 2 for the Defendant, and including the authentication by the proper officers. I will go back and state that the certified copy, or authenticated copy of the chattel mortgage for $2,010.86 to secure the payment of that note, was marked as Defendant's Exhibit 1, and the one to secure the payment of the $1,500.00 note was marked as Defendant's Exhibit 3. We will also offer to show by this witness, that later, but not on the same day, there was a note signed, in the sum of $682.98, to be signed by Oscar Mosher and Sophia Mosher.

(Defendant's Exhibit 6 marked for identification by the reporter.)

Mr. Hanton (Continuing:) That the same was transmitted in blank to be signed, by letter, mailed from the Dazey State Bank, and received through the United States mail, and with that note there was a letter evidenced by Defendant's Exhibit 6, which will be made a part of the testimony of this witness, sent out by the Dazey State Bank and signed by J. E. Jacobson as an officer of the said bank. We will also show that——

Mr. Ueland: If the Court please—if I may interrupt for a moment—Mr. Hanton is going into such detail with the offer that I would like to have the jury excuse it.

The Court: I will tell you what I think would be better than that—we might adjourn to the Court's chambers and take the offer there—leave the jury right here and then discuss this question. The jury can have a recess.

Mr. Hanton: Very well. (Parties adjourn to Court's Chambers, where the offer was continued as follows:) That this defendant's Exhibit 6 came into her possession after her husband's death, as administratrix of his estate, and as being part of the papers that were left after his death and were found in their home on the farm out of Dazey, North Dakota; that this note was signed by Oscar Mosher and Sophia Mosher and returned to the Dazey State Bank, and that the said note, we will offer to show, was afterwards called to the attention of Sophia Mosher for payment. [fol. 104] Demand for payment was made on her, on the said note; that said note is not paid; that it is still in the

possession of the Receiver of Closed Banks of North Dakota.

(Defendant's Exhibit 7 marked for identification by the reporter.)

Mr. Hanton (Continuing:) That Defendant's Exhibit 7 was found among the papers in her home, after the death of here husband and was produced by her and turned over to the attorney for the Dakota Life Insurance Company, and that it is a demand for the payment of the $2,010.86 note, made January 13th, 1923, and due October 13th, 1923, by the Midland National Bank, now this plaintiff. We will offer to show also that at that time there was only one statement made, at the time that the notes were signed, and that was that they were there to secure the renewal of the note, the amount that was due to the Dazey State Bank and J. E. Jacobson at that time, and that the papers were laid on the table.

The Court: May I call your attention to one thing right here, Mr. Hanton—can you tell me how the notes signed at that time could have on them revenue stamps cancelled in 1922?

(Plaintiff's Exhibits D and E handed to Mr. Hanton by the Court.)

Mr. Hanton: I don't know.

Mr. Ueland: What notes are those?

The Court: The two $5,000.00 notes have revenue stamps on, cancelled in May, 1922.

Mr. Ueland: I think it must be a mistake. We do not question the date they were taken.

Mr. Hanton: I cannot make out when they appear to have been cancelled. It seems to be 1922, May, 1922—is that right?

The Court: Yes. One of them was quite plain.

Mr. Hanton: Yes, it appears to be plain, May 22nd, 1922.

Mr. Ueland: Yes, they are all May, 1922. However, I do not think there is any question about when the notes were signed by the Moshers. We do not know when they were prepared. They may have been prepared here, for all we know.

(Part of statement by Mr. Hanton, ending "and that the papers were laid on the table," read by reporter.)

[fol. 105] Mr. Hanton (Continuing:) —and were then signed; that there was no statement made, of any $5,000.00 notes. There was no statement made that there were two $5,000.00 notes to be signed; that there was nothing stated as to an amount of $10,000.00 being turned over or being paid, or that there was any amount of that kind due from Oscar Mosher or from Sophia Mosher; that those notes, if they were signed by Oscar Mosher and Sophia Mosher, were not called to their attention, and that Oscar Mosher and Sophia Mosher did not receive any consideration for the said notes. You can mark those as Defendant's Exhibits 8 and 9, because they are two photostatic copies handed to me by the plaintiff.

Mr. Ueland: The originals are in evidence. You do not need the copies.

Mr. Hanton: I thought you wanted to withdraw them.

The Court: Well, they are in evidence now, Mr. Hanton, and if they are to be withdrawn, then these copies can be substituted.

Mr. Ueland: We will not withdraw them until the case is disposed of.

Mr. Hanton: This witness further will testify that there had been no prior debt of Oscar Mosher's or hers, for which these two $5,000.00 notes were made; that all that the Dazey State Bank and J. E. Jacobson had against them at that time was, as near as she can remember, around—I can't state the amount—I do not remember exactly.

The Court: About $5,500.00?

Mr. Hanton: About $5,500.00. That they had no property except machinery and horses, and cattle, and that the total value of that property at that time was far less than the amount of the $5,500.00 that they owed to the Dazey State Bank and J. E. Jacobson, and that besides that they were indebted to the First National Bank of Valley City, North Dakota to an amount around $3,500.00; that they had a farm, and this was foreclosed by the Dazey State Bank on the 13th day of February, 1915, and the time of redemption expired on the 13th day of February, 1916, and that from that time on the farm was leased to them by J. E.

Jacobson, and that they paid rent every year for the said land.

Mr. Ueland: You said, "foreclosed by the Dazey State Bank."

[fol. 106] Mr. Hanton: Foreclosed by J. E. Jacobson—I beg pardon—that is correct. We will also offer to show authenticated copy of Exhibits 1, 2 and 3, schedules of mortgages.

(Defendant's Exhibits 8 and 9 marked for identification by the Reporter.)

Mr. Hanton: Authenticated copies of Exhibits 1, 2 and 3, Exhibits 8 and 9. We will also offer in evidence, the record marked as Defendant's Exhibit 10——

(Defendant's Exhibit 10 marked for identification by the Reporter.)

Mr. Hanton (Continuing:) —being authenticated bill or statement of notes, relating to the Dazey State Bank's account against Oscar and Sophia Mosher, and showing all notes paid except three, one of $2,010.86, one of $1,500.00 and one of $682.98. We also offer to show, in this case, by J. J. Bell, Actuary of the Company, that he approved this assignment of this policy——

Mr. Ueland: The approval that was actually executed by the insurance company is in evidence.

The Court: Yes, that is already in evidence.

Mr. Hanton: We also offer to show by the witness J. J. Bell, Actuary of the Dakota Life Insurance Company, that he approved said assignment, subject however to all the terms and conditions set forth in said policy, on the 2nd day of March, 1923 at his office at Watertown, South Dakota, and it was then transmitted by him by mail to the Midland National Bank of Minneapolis, Minnesota, and that at the time that this assignment was made and approved, he was not aware of any defenses that existed or might exist relative to the said policy of $10,000.00 described in said assignment, and he was not aware that the said two promissory notes aggregating $10,000.00 described in the said assignment, and for which the said assignment was made to secure the payment of the same, were made without consideration on the part of the said insured, and that the two notes were

executed without knowledge of the signers and that the signing of the same had been procured by a trick or deception, and also that the attention of the signers was called to the execution and signing of other notes and chattel mortgages securing the same, no reference having been made to the execution of the said two notes; that he believed at the time that he approved the said assignment, that there was [fol. 107] consideration, and that the notes were actually due, or that there had been consideration passed to the makers of the notes, and that if he had been informed of the true state of facts, that said assignment would not have been approved. We will also offer to show by the witness Maxwell Ladbury, that he had a conversation with C. B. Neal, the representative of the plaintiff and the party who was present at the time that these notes were executed on the 13th day of January, 1923, having reference now to the two $5,000.00 notes and the three other notes, one being for $1,500.00, one being for $2,010.00 and the other for $1,646.00 to J. E. Jacobson; that this conversation took place at the hotel at Dazey, North Dakota during the fall of 1923 and that this was the only conversation he had with him during that fall, in which C. B. Neal stated that these papers were all prepared and taken out to the farm, and they went there to get them signed, and that the papers were signed and they left; that before they went out there, he had the opinion that these two $5,000.00 notes were of no account, and that he doubted if they would be signed; that after he got there, the notes were signed, and they were taken up and brought to Dazey, North Dakota. That concludes my offer of proof.

Mr. O'Malley: I wonder if it may be stipulated that the offer of testimony as to each of these witnesses may be considered as separate offers, and as if the witnesses had been put on separately, and that they may be treated as separate offers. Any objection to that, Mr. Ueland?

Mr. Ueland: No objection to that—that they may be considered as separate offers. Can I make one suggestion to the Court?

The Court: Yes.

Mr. Ueland: The assignment—the last assignment of the policy Exhibit C, is dated February 26th, 1923 and it is acknowledged February 27th, 1923 by Oscar Mosher. This

assignment was given more than a month, or a month and a half after these notes were given, the two $5,000.00 notes, and that is already in evidence and is something that the Court should consider in connection with the offer.

The Court: Do you want to make an objection to the offer?

Mr. Ueland: I will make the same objections to the offer that I made to the last question which was asked of Mrs. [fol. 108] Mosher. I object to the offer on the ground that the defendant proposes to show immaterial and irrelevant matter, insofar as he proposes to show a fraud practiced upon Oscar Mosher. I also object to the offer because even if the defendant were able to show what he offers to prove, it would not sustain the contention of fraud. I further object to the offer insofar as the defendant offers to show by the witness Sophia Mosher, conversations with Oscar Mosher who is now deceased.

Mr. Hanton: In regard to the last statement of objection, I will state to the Court that we think that objection is not well taken for this reason, that this was not a transaction had on the part of the witness Sophia Mosher, with her husband, the deceased Oscar Mosher, neither is it a communication that was made between them, and that the testimony is in our opinion competent to show transactions had by her and her husband with the Midland National Bank, the plaintiff in this case. As to the conversations she is, in our opinion, competent to testify as to anything and everything that was said there with the representative of the people who brought those papers there for signature; also competent to testify as to the condition of their indebtedness and also as to the condition of the property that they owned and the value thereof.

The Court: Well, it seems to me that the situation, from a legal standpoint, is this; that the Dakota Life Insurance Company issued this policy on the life of Oscar Mosher; that subsequently the policy was assigned, and the assignment approved by the company; that so far as the company is concerned, the Midland National Bank of Minneapolis is the owner and holder of the policy under the assignment. Now the Dakota Life Insurance Company seeks to set up a fraud practiced upon the insured, in order to defeat the policy in the hands of the assignee. It does

not seem to me that that can be done. I think I will have to sustain the objection upon that theory.

Mr. Hanton: May we have an exception?

The Court: Certainly.

Mr. Hanton: At this time the defendant also asks to strike from the evidence in this case, Exhibits D and E of the Plaintiff, on the ground that the same are not admissible in evidence in this Court; that no stamp taxes have been affixed thereto; that there has been no legal cancellation of any stamp taxes; that the stamp taxes affixed [fol. 109] to the said notes appear to have been cancelled on May 22nd, 1922; that the notes are the notes for which the assignment was secured, for which the assignment was made and to secure the payment thereof, and for no other purpose, and I will ask that said evidence be stricken from the record.

The Court: The motion will be denied.

Mr. Hanton: Exception is taken. We also ask the Court to consider the testimony in this case, and that the evidence is insufficient on the part of the plaintiff, taking into consideration the evidence that has been admitted for the defendant, to hold that there was any consideration for the making of the said notes, and that the assignment that had been made to secure the payment of the said notes, is of no force and effect: that the making of the said notes was without consideration in this, that the bank did not advance any money; that the bank did not extend any time of payment on the notes; that the bank did not part with any consideration in obtaining the said assignment, and so far as the bank is concerned, they are absolutely barred from recovering on this assignment, the amount of $10,000.00, without having parted in any way, shape or form, with any consideration therefor.

The Court: Is the testimony closed, Mr. Hanton?

Mr. Hanton: The testimony is closed, so far as we are concerned, yes.

The Court: Have you any other testimony (to Mr. Ueland)?

Mr. Ueland: The plaintiff asks leave to rest for the purpose of making a motion for a directed verdict.

The Court: Very well.

Mr. Ueland: The plaintiff moves for a directed verdict in the sum of $9,724.06, with interest thereon at the rate of 6 per cent per annum from October 12th, 1923.

Mr. O'Malley: At this time the defendant moves for a directed verdict on the ground that the testimony shows beyond any dispute that the assignment is merely colorable, and that the Midland National Bank paid no consideration whatsoever therefor.

The Court: Well, of course, that eliminates the jury, and I will take both motions under advisement at this time. I [fol. 110] would like to look into some phases of this thing a little bit further, although I am satisfied that the theory which Judge Booth and I have adopted is the correct one, and except for some possible question of consideration, that the plaintiff is entitled to a directed verdict, but as I say, I will look into it and give it a little further consideration. Have you any authorities on that point, Mr. Ueland? Is there any question about consideration having passed from the Midland National Bank for the assignment?

Mr. Ueland: Why, these notes that are in evidence are negotiable instruments. The negotiable instrument law applies there, and the policy follows the notes.

Mr. Hanton: But the defendant shows there was no consideration—then notes—we contend that there was no consideration for the notes. The offer of the bank testified that there was no consideration passed at the time they were received.

The Court: We will adjourn to the court room.

(Adjournment to the Court room).

The Court: Gentlemen of the Jury: each side in this case has made a motion for a directed verdict, which means that that eliminates any question of fact for you to consider, and leaves the whole matter for me to consider as a question of law, so you will not have to bother about this lawsuit any further.

Reporter's Certificate to foregoing omitted in printing.

[fol. 111] PLAINTIFF'S EXHIBIT A

(Insurance Policy)

D. L. I. Co.

Number: 18260. Dollars: 10,000

Dakota Life Insurance Company, Watertown, South Dakota, by this policy of insurance agrees to pay, amount of

insurance, ten thousand dollars, at the home office of the company, in Watertown, South Dakota, to beneficiary, the executors, administrators, or assigns of the insured, if then living (with the right on the part of the Insured to change the beneficiary) immediately upon receipt of due proof of the death, during the continuance of this Policy, of the Insured, Oscar Mosher.

This policy is issued in consideration of the answers made in the application herefor, and the statements made therein, all of which are made a part hereof, and copied hereon, and of the premium of three hundred ninety-four and 20/100 Dollars payable in advance at the home office of the company or as provided under paragraph number three on the second page hereof, in exchange for the company's receipt on or before the twenty-eighth day of November in every year during the continuance of this Policy, until the death of the Insured, subject to the privileges and provisions on the subsequent pages hereof which are hereby made a part of this contract as much as if recited over the signatures hereto affixed.

In witness whereof, the said Dakota Life Insurance Company, at its home office, in the city of Watertown, South Dakota, has caused this Policy to be signed by its President and Secretary this fourteenth day of May, one thousand nine hundred and twenty.

John B. Hanten, President. F. L. Bramble, Secretary.

Attest: D. J. Ross. (Seal.)

[fol. 112] Ordinary Life Policy, Non-participating. Premiums Payable for Life

General Conditions

1. Modifications, Etc.—No condition, provision or privilege of this Policy can be waived or modified in any respect except by the written agreement of the Company, in compliance with the laws of the state in which the Policy is issued, signed by the President, Vice-President, Secretary or Actuary, whose authority will not be delegated. No agent has the power in behalf of the company to make or modify this or any other contract of insurance to extend the time for payment of premiums, to waive any forfeiture or

to bind the company by making any promise, or making or receiving any representation or information.

2. Indebtedness—Any indebtedness to the Company on account of this Policy will be deducted from any amount payable thereon in any settlement hereunder.

3. Payment of Premiums—This Policy is based upon the payment of premiums annually in advance, but if premiums be made payable in quarterly or semi-annual installments, any future installments of the premium for the current policy year remaining unpaid at the maturity of the Policy shall be considered an indebtedness to the Company on account of this Policy. Premiums are payable at the home office of the Company, but may be paid to an agent of the Company on or before the dates when due, in exchange for official receipts signed by the President or the Secretary and countersigned by an authorized agent of the Company. If any premium be not paid when due, this Policy shall be void and all premiums forfeited to the Company, except as herein provided.

4. War Clause—Military and Naval service, or any service allied thereto or connected therewith, outside the boundaries of Continental United States or its possessions in the Western Hemisphere, and therein if invaded, in time of war, are risks not assumed under this Policy and where death occurs under these conditions the liability of the Company hereunder shall be limited to the reserve of the Policy at the time of death, and if the insured shall become totally disabled while in the above service the Company shall not be liable for the Total Disability Benefits as provided in this Policy, unless a permit for such service shall have been applied for in writing and granted by the Company, and an extra Premium, as determined by the Company, paid therefor.

[fol. 113] 5. Assignment—No assignment hereof shall be binding upon the Company unless made by an instrument in writing endorsed upon this Policy or attached thereto, and the Company shall not be deemed to have knowledge of such an assignment unless the original or the duplicate thereof is filed at the home office of the Company and its receipt duly acknowledged. The company will not assume the responsi*b*bility for the validity of an assignment.

6. Suicide—In the event of the death of the Insured, within one year from the date hereof, by his or her own hand, whether sane or insane, the liability of the Company shall be the amount of the premium paid.

7. Change of Beneficiary—When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the Insured, subject to any existing assignment of the Policy, may designate a new beneficiary with or without reserving right of revocation by filing written notice thereof at the home office of the Company, accompanied by the Policy for suitable endorsement thereon. If any beneficiary shall die before the Insured, and the Insured shall not have designated a new beneficiary, the interest of such beneficiary shall be payable to the Insured, his executors, administrators or assigns.

8. Incontestability—This Policy constituted the entire contract between the parties and shall be incontestable from its date except for non-payment of premiums and except as otherwise provided in this Policy. All statements made by the Insured shall in the absence of fraud, be deemed representations and not warranties and no such statement shall avoid this Policy unless it is contained in a written application and a copy of such application shall be endorsed upon or attached to this policy when issued. If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Special Privileges

9. Cash Loan—After three full annual premiums have been paid on this Policy, if it be still in force, the Insured may borrow at any time during the year, on the sole security of this Policy, properly assigned to the Company [fol. 114] with interest at not more than six per centum per annum payable in advance, an amount not exceeding the cash value at the end of the current year as herein specified, less any indebtedness on account of this Policy. Failure to repay any such indebtedness or to pay interest thereon, shall not avoid the Policy, unless the total indebtedness thereon to the Company shall equal or exceed

the loan value at the time of such failure, nor until one month after notice to that effect shall have been mailed by the Company to the last known address of the Insured, of the person to whom the loan was made, and of the assignee of record at the home office of the Company, if any. Such loan may be deferred for not more than sixty days after the application therefor is made. It may be repaid at any time and any unearned interest, paid in advance, will be refunded by the Company.

10. Automotic Premium Loan—If any premium on this Policy be not paid in cash on or before the date on which it is due or within the month of grace, the Company will charge up such premium (and any subsequent premium or premiums not paid in cash), with interest at not more than six per centum per annum, against the loan value of this Policy as stated above, provided that any such loan value is sufficient, and provided that the written request to that effect has been made by the owner hereof at any time while there is no default in payment of any premium hereunder. Any premium or premiums so charged against the loan value of this Policy shall be considered as a loan upon the Policy, and shall be subject to the same terms and conditions as any loan made under the terms of the Special Privilege Clause No. 9, entitled "Cash Loan." Such request may be revoked at any time in writing by the said owner, provided, however, that such revocation shall not affect any loan that may have been previously made under this privilege.

11. Grace in Payment of Premiums—A grace of one month (not less than thirty days) will be allowed in the payment of all premiums except the first, during which time this Policy will remain in force. If the Insured should die during the period of grace the over-due premium will be deducted from any amount payable hereon in any settlement hereunder.

12. Reinstatement of Contract—In case of default in the payment of any premium or interest, the Company will reinstate the contract at any time, if not previously surrendered for its cash value, upon written application by the [fol. 115] Insured to the Company at its home office, with evidence of insurability satisfactory to the Company, pay-

ment of all premiums that would have been paid in the intervening time if no default had been made, with interest thereon at the rate of six per centum per annum computed from the premium due date, and payment or reinstatement, with interest at like rate, of any indebtedness existing at the time of default.

13. Installment Privileges.—The amount insured under this Policy is payable in one sum, but if the amount payable be not less than $1,000.00 it may be made payable instead in equal annual installments in any number from two to twenty-five; or may be payable to the Beneficiary, if such Beneficiary be one natural person, in equal annual installments to continue for twenty years certain and so long thereafter as the Beneficiary shall live; or part of the amount may be withdrawn in cash and the balance, not less than $1,000.00, may be made payable in installments as above specified. If the insured shall not have directed otherwise, such installments may be commuted on any installment due date, the amount due being the present value of the future installments.

The amount of such installments shall be based upon the amount insured under this Policy and shall be determined from the tables below.

Installments—from Two to Twenty-five

Number of Installments	2	3	4	5	6	7	8	9
Amount of each Installment per $1,000	509	345	263	214	181	158	141	127
Number of Installments	10	11	13	14	15	16	17	18
Amount of each Installment per $1,000	116	107	100	94	88	84	80	76
Number of Installments	19	20	21	22	23	24	25	
Amount of each Installment per $1,000	73	70	68	66	62	60	59	

Installments—Continuous

Age last birthday of beneficiary at death of insured	16 and under	17 to 21	22 to 24	25 to 27	28 to 30	31 and 32	33 and 34	35 and 36
Amount of each Installment per $1,000	44	45	46	47	48	49	50	51

[fol. 116]

Age last birthday of beneficiary at death of insured	37 and 38	39 and 40	41 and 42	43	44 and 45	46	47 and 48	49
Age last birthday of beneficiary at death of insured		50 and 51	52	53 and 54	55 and 56	57	58 and 59	60 and over
Amount of each Installment per $1,000		52	53	54	55	56	57	58	59
Amount of each Installment per $1,000		60	61	62	63	64	65	66

14. Trust Fund Privileges.—The amount of this Policy, if not less than $1,000.00 at the time when it becomes payable, may be placed in trust with the Company during the lifetime of the Beneficiary, and the Company will pay thereon, so long as the said amount remains with the Company, interest at the rate of three and one-half per centum per annum. At the death of the Beneficiary this fund shall be paid to the executors, administrators or assigns, but may be withdrawn at any time with accrued interest if the insured shall not have directed otherwise.

15. Total and Permanent Disability.—If, after one annual premium shall have been paid in cash, and while there is or has been no default in the payment of any premium or interest, the Insured shall furnish proof satisfactory to the Company that he has been wholly disabled by bodily injuries or disease, and that he will be permanently and continuously wholly disabled for life from pursuing any and all gainful occupations, the Company by an endorsement in writing upon this Policy will agree to pay all premiums for the Insured thereafter becoming due during the continuance of such disability and in such event the values of this Policy, as given in the schedule, shall increase in the same manner as if the premiums were being paid by the Insured. If the Insured shall so far recover, however, as to be able to engage in any gainful occupation for wages or profit, the Company's obligation to pay the premiums shall cease and the Insured shall resume the payment of premiums in accordance with this Policy on the first premium due date following such recovery.

16. Change of Plan.—This policy may be changed at any time for any higher premium Policy regularly issued by the Company, such new Policy to bear the same date as this Policy, by the payment of the difference between the premium of new Policy and the premium of this Policy with interest at not more than six per centum per annum.

[fol. 117] Non-Forfeiture Privileges

17. Cash Surrender Values.—If this Policy be legally surrendered to the Company within one month from date of default, provided three premiums shall have been paid in full, the Company will pay therefore in cash the sum indicated in the following table, less any indebtedness on account of this Policy; which cash value shall be equal to the sum which would otherwise be available for the purchase of paid-up or extended insurance. Payment of such cash value may be deferred for not more than six months after the application therefor is made.

18. Paid-up Insurance.—If this policy, after being in force for three full years, shall lapse for the non-payment of any premium, and if it be not surrendered for its Cash value, the Company will issue a nonparticipating Paid-up Policy as specified in the following table, upon the legal surrender of this Policy within one month from date of default; provided, however, that if there be any indebtedness to the Company on account of this Policy, the amount of such Paid-up Policy will be reduced in the proportion that the total indebtedness bears to the then Cash Surrender Value of the Policy. The Insured may, at any time, borrow on the sole security of such Paid-up Policy an amount equal to the present value of said Policy on the last anniversary preceding the date of such loan.

19. Automatic Extended Insurance.—If this Policy lapse as specified above and be not surrendered for its Cash Value or for a Paid-up Policy, the Company will, without any action on the part of the Insured, grant the option as shown in the column "Automatic Extended Insurance," such Extended Insurance to be non-participating insurance and for the full amount of this Policy, the same to take effect on the day to which the premiums have been duly

paid and to continue in force for the term indicated in the following table; provided, however, that if there be any indebtedness on account of this Policy, the amount of such Extended Insurance will be the face amount of this Policy less the indebtedness and the term shall be changed to that term for which the cash surrender values of this Policy herein specified less the indebtedness, will carry the modified amount at Single Premium Term rates according to the American Experience Table of Mortality with interest at three and one-half per centum per annum.

[fol. 118] 20. Cash Surrender Values Under Paid-up and Extended Insurance.—If this Policy be surrendered for Paid-up or Extended Insurance as above indicated, such Paid-up or Extended Insurance may be surrendered at any time for its full reserve value at the time of such surrender.

21. Annuity Option.—The insured may, at any time after twenty full annual premiums shall have been paid on this Policy, if it is still in force and there is no indebtedness on account of it to the Company, convert its full legal reserve into a Life Annuity, the first installment to be paid on the next succeeding anniversary of this policy and a like amount each year as long as the Insured shall live. Upon the death of the Insured, the Company's liability under such Annuity shall cease.

The amount of such Annuity on November 28, 1940, will be $630.00; amounts for future dates will be furnished upon request.

Table Above Referred to Age 50.

Cash Surrender and Loan Values and Paid-up Insurance in the following Table, apply to a Policy for $1,000. Since this is a policy for $10,000 the values available in any year will be ten times the amount stated in the Table below for the year.

At the end of	Cash surrender and loan values	Paid-up insurance	Automatic extended insurance	
			Years	Days
1 Year	None	None	None	None
2 Years	None	None	None	None
3 "	$47	$86	2	343
4 "	72	129	4	67
5 "	96	169	5	63

At the end of	Cash surrender and loan values	Paid-up insurance	Automatic extended insurance	
			Years	Days
6 Years	121	209	6	13
7 "	146	247	6	270
8 "	172	285	7	129
9 "	197	320	7	294
10 "	223	355	8	71
11 "	248	387	8	168
12 "	274	420	8	251
13 "	300	451	8	311
14 "	325	480	8	342
15 "	350	508	8	359
16 "	376	536	9	10
17 "	400	561	8	363
18 "	425	587	8	354
19 "	449	610	8	330
20 "	473	633	8	302

[fol. 119] *Loans will be granted at the beginning instead of at the end of the year, if so desired, provided the entire premium for the year has been paid.

22. Valuation.—The values in the above table are based up- the American Experience Table of Mortality with interest at the rate of three and one-half per centum per annum and are equivalent to the full reserve according to the Illinois Standard Basis of Valuation. Values for later years will be computed upon the same basis and furnished upon request to the Home Office.

If the premiums on this Policy be paid in quarterly or semi-annual installments, due allowance will be made in computing benefits from the above table for that portion of a year's premium paid over and above the full number of years' premiums indicated.

The first year's insurance under this Policy is Term Insurance.

Copy of the Application Upon Which this Policy is Issued and Which is Made a Part of the Policy Contract

1. A. My full name is Oscar Mosher
   B. All notices are to be sent to
   C. Address
      Dazey, North Dakota.
2. A. Where born—
      Montcalm County, Michigan.

B. When born—

Month	Day	Year
August.	5th.	1870.

C. Age (Nearest birthday) 50.
D. I am married.
E. Race or nationality—American.

3. My occupation and duties thereof are fully described as follows: Farming.

4. I have no life insurance except as herein stated.

Company	Amount	Company	Amount
M. W. A.	$2,000		

5. No application ever made by me for life insurance has been declined, nor has any contract ever been issued other than as applied for— No.

6. A. Kind of Policy, Ordinary

B. Amount of Insurance $10,000.00

C. Amount of Premium, $108.50 S. Term.

D. The premium is to be paid Annually on Nov. 28th each year.

394.20. Use such terms as Ordinary Life, 20-Payment, 20-Year (Annually, Semi-Annually or Quarterly).

7. At my death the insurance shall be payable to

Name in full	Age	Relationship	Residence
my estate			

(With privilege to change on my written request.)

[fol. 120] I Hereby Agree: That this application and the policy hereby applied for, taken together, shall constitute the entire contract between the parties hereto, and I hereby declare that all the answers and statements made above and those that shall be made to the Medical Examiner are true, and that this contract shall not take effect until the first premium has been paid during my good health. To have the required medical examination made within thirty days by a physician appointed by the Company, or at such other time thereafter as may be fixed in writing.

Dated at Dazey, N. D., this 14th day of May, 1920.

Witnessed by E. J. Jacobson, Agent, P. L. Higgins & Oscar Mosher, Applicant. (Sign the name in full.)

Received of Oscar Mosher, $108.50. Preliminary Term, to carry this policy, #18260, from May 14, 1920 to November 28, 1920.

(Signed) Raymond F. Rutter, Actuary.

(Endorsement on outside of policy:) South Dakota. Number 18260. Dakota Life Insurance Company, Water-

town, S. Dak. Policy on life of Oscar Mosher. Amount: $10,000.00; Age: 50; Date: November 28, 1920; Annual Premium: $394.20; Semi-annual Premium: $205.00; Quarterly Premium: $104.50. Ordinary Life Policy, Non-Participating. Premiums payable for life. Register of Change of Beneficiary.

NOTE.—No change, designation or declaration shall take effect until endorsed on this Policy by the Company, at its Home Office.

[fol. 121] Date Endorsed $—— Beneficiary ..... Endorsed by —— —, 19—

Received from the Dakota Life Insurance Company, of Watertown, South Dakota, — Dollars, in full settlement of all claims of the within Policy, terminated by — and the Dakota Life Insurance Company is hereby forever released from any and all further liability thereunder.

—— ——.

Witness: —— ——.

PLAINTIFF'S EXHIBIT B

(Attached to Plaintiff's Exhibit A)

Assignment of Policy of Life Insurance

This indenture, made this 10th day of October, A. D. 1921 between Oscar Mosher, hereinafter called party of the first part, and Dazey State Bank, Dazey, N. Dak., hereinafter called the beneficiary, and J. E. Jacobson of Dazey, North Dakota, hereinafter called party of the second part.

Witnesseth, in consideration of One Dollar and other valuable consideration, to the said party of the first part and the said beneficiary paid by the said party of the second part, the receipt whereof is hereby acknowledged, the said party of the first part and the beneficiary do hereby assign unto the said party of the second part, his executors, administrators and assigns, all that policy of insurance on the life of the said party of the first part, granted by the Dakota Life Insurance Company of Watertown, S. D., Numbered 18260, for the sum of Ten Thousand

and 00/100 Dollars, payable in the event of death to said beneficiary, his executors, administrators and assigns, and all the moneys secured or to become due by or under the said policy and the full benefit thereof, with power to give an effectual discharge for all moneys to become payable thereunder; to have and to hold the same unto the said party of the second part, his executors, administrators and assigns.

And the said party of the first part does hereby covenant with the party of the second part that he, the said first [fol. 122] party, will not do or knowingly suffer anything whereby the said policy may be rendered void or voidable, or the said party of the second part may be prevented from receiving the said sum of $10,000.00 or any part thereof; and that the said party of the second part will promptly and punctually pay all premiums and other charges that may become due or payable under said policy. In the event that such premiums or other charges shall not be paid promptly and punctually, then the party of the second part may pay the same and the amounts so paid shall be added to and become a part of the debt hereby secured, or the party of the second part may exercise or elect any of the options granted in said policy.

This assignment is given to secure the payment to the said party of the second part the sum of, as per designated amount of, Dollars, according to the tenor and conditions of several promissory note-.

In witness whereof, the said party of the first part and the beneficiary have hereunto set their hands and seals this 10th day of October, A. D. 1921.

Oscar Mosher. Dazey State Bank, by W. D. Jacobson, Cashier. (Corporate Seal.)

In witness whereof: Geo. F. Sheldon, A. J. McInnen.

State of North Dakota,
County of Barnes, ss:

On this 10th day of October, A. D. 1921, before me a Notary Public in and for said County and State, personally appeared Oscar Mosher, and H. L. Jacobson, Cashier of Dazey State Bank, known to me to be the persons who are described in and who executed the within and foregoing

instrument and duly severally acknowledged to me that they executed the same.

A. J. McInnen, Notary Public, Barnes County, N. Dak. My commission expires Nov. 29, 1924. (Notarial Seal.)

The foregoing assignment is hereby approved, subject, however, to all the terms and conditions set forth in said policy. Dated the 18th day of October, 1921.

Dakota Life Insurance Company, by J. J. Bell, Actuary.

[fol. 123] PLAINTIFF'S EXHIBIT C

(Page 1)

(Attached to Plaintiff's Exhibit A Insurance Policy)

Assignment of Policy of Life Insurance

This Indenture, made this 26th day of February, A. D. 1923 between Oscar Mosher, hereinafter called party of the first part, and J. E. Jacobson, hereinafter called the beneficiary, and Midland National Bank of Minneapolis, Minn., hereinafter called party of the scond part,

Witnesseth, in consideration of Ten Thousand and 00/100 Dollars to the said party of the first part and the said beneficiary paid by the said party of the second part, and the receipt whereof is hereby acknowledged, the said party of the first part and the beneficiary do hereby assign unto the said party of the second part, his executors, administrators and assigns, all that policy of insurance on the life of the said party of the first part, granted by the Dakota Life Insurance Company of Watertown, S. D., numbered 18260 for the sum of Ten Thousand and 00/100 Dollars, payable in the event of death to the said beneficiary, Midland National Bank and all the moneys assured or to become due by or under the said policy and the full benefit thereof; with power to give an effectual discharge for all moneys to become payable thereunder; to have and to hold the same unto the said party of the second part, his executors, administrators and assigns.

And the said party of the first part does hereby covenant

with the said party of the second part, that he, the said first party, will not do or knowingly suffer anything whereby the said policy may be rendered void or voidable, or the said party of the second part may be prevented from receiving the said sum of $10,000.00 or any part thereof; and that the said party of the first part will promptly and punctually pay all premiums and other charges that may become due or payable under said policy. In the event that such premiums or other charges shall not be paid promptly and punctually, then the party of the second part may pay the same and the amounts so paid shall be added to and become a part of the debt hereby secured, or the party of the second part may exercise or elect any of the options granted in said policy.

This assignment is given to secure the payment to the said party of the second part of the sum of Ten Thousand and 00/100 Dollars, according to the tenor and conditions of two promissory notes.

[fol. 124] In witness whereof, the said party of the first part and the beneficiary have hereunto set their hands and seals this 26th day of February, A. D. 1923.

Oscar Mosher, J. E. Jacobson.

In witness whereof: F. G. Haag, R. C. Jacobson.

STATE OF NORTH DAKOTA,
County of Barnes, ss:

On this 27th day of February, A. D. 1923, before me, a Notary Public is and for said County and State, personally appeared Oscar Mosher, and J. E. Jacobson, known to me to be the persons who are described in and who executed the within and foregoing instrument, and duly severally acknowledged to me that they executed the same.

Rudolph C. Jacobson, Notary Public, Barnes County, N. Dak. My commission expires Sept. 30, 1928. (Notarial Seal.)

The foregoing assignment is hereby approved, subject, however, to all the terms and conditions set forth in said policy. Dated the 2nd day of March, 1923.

Dakota Life Insurance Company, by J. J. Bell, Actuary.

PLAINTIFF'S EXHIBIT D

$5,000.00 Dazey, North Dakota, Jan. 13th, 1923.

On demand after date, without grace, for value received I promise to pay J. E. Jacobson or order, Five Thousand 00/100 Dollars, at the Dazey State Bank, Dazey, N. D., with interest at ten per cent after date, payable annually. Interest and principal not paid when due shall draw interest at the rate of 10 per cent per annum.

The makers, sureties and endorsers of this note hereby severally waive presentment for payment, notice of non-payment, protest and notice of protest of this note, and guarantee its payment.

(Signed) Oscar Mosher. (Signed) Sophia Mosher.

Due — No. 11.

[fol. 125] (Endorsement on back) (J. E. Jacobson.) Revenue stamps, 80 cents, attached and cancelled by stamp, "Dazey St. Bank, May, 1922, Dazey, N. Dak.")

PLAINTIFF'S EXHIBIT E

$5000.00 Dazey, North Dakota, Jan. 13th, 1923.

On demand after date, without grace, for value received, I promise to pay J. E. Jacobson Five Thousand 00/100 Dollars at the Dazey State Bank, Dazey, N. D., with interest at ten per cent after date, payable annually. Interest and principal not paid when due shall draw interest at the rate of 10 per cent per annum.

The makers, sureties and endorsers of this note hereby severally waive presentment for payment, notice of non-payment, protest and notice of protest of this note, and guarantee its payment.

(Signed) Oscar Mosher. (Signed) Sophia Mosher.

Due — No. 12.
(Written on side of note.)
P. O. —.
Sec. — Twp. — Rng.—.
Name —.

(Written on back) J. E. Jacobson (Revenue Stamps, $1.00 attached and cancelled by stamp, "Dazey State Bank, May, 1922, Dazey, N. Dak.")

PLAINTIFF'S EXHIBIT F

Form 132.

Memorandum of Collateral Deposited by J. E. Jacobson with the Midland National Bank, Minneapolis, Minn., Dazey, N. Dak.

Date	Loan Number	Description	Amount	Date returned	Recd. by
Copy. Original with Ueland & Ueland Oct. 16, 1925.		Old notes JEJ to Mid. Nat. Bank. Dated 1-16-22 due 1-16-23. $16,342.90.		Now attached to Mtg. back of 18,342.90 note.	
From Disct. Dept.		Dated 11-9-21 due 12-1-22. 10,500 bal. 4,618.			
[fol. 126]		Dated 11-9-21 due 12-1-22. 7,500 bal. 5,000.			
		Dated 11-9-21 due 12-1-22. 5,040 bal. 3,500.			
		Dated 11-9-21 due 12-1-22. 3,000 due 2,000.			
2-5-1923	From CM. CBN.	JEJ to Sharpe on one-half interest in all crops harvested during 1923 as described in CM Griggs Co. ND Sec. 22 Tp. 144 Rg. 61.		Now attached to Mtg. back of 18,342.90 note.	
	CM.	JEJ to Sharpe on one-half interest in all crops during 1923 on land as described in CM also one third in all 1923 crops on land as described in CM NE¼-2-142-59 East ½ Sec. 2 143-59 Barnes County, N. D.			
3-2-1923	Addn. 11.	Oscar Mosher, et ux. Dem. 5,000.			
	12.	Oscar Mosher, et ux. Dem. 5,000.			
		18,260 Dak. Life Ins. Pol. for 10,000 attached.			
		Asst. Mosher to Jacobson.			
		" JEJ to Midland.			

Form 132.

(On Back thereof.)

Memorandum of Collateral Deposited by J. E. Jacobson with the Midland National Bank, Minneapolis, Minn., Dazey, No. Dak.

Date	Loan Number	Description	Amt.	Date returned	Recd. by
Copy. Original with Ueland & Ueland Oct. 16, 1925. 1-25-1923 Addn.		Mtg. Deed J. E. Jacabson to J. H. Sharpe on NE¼ Sec. 2-Tp. 142-59W. S½ 35-143-59W. NE¼ 30-143-60W. S½ 12-143-60W. SW¼ 1-SE¼-2 NE¼ 11 & NE¼ of NW¼ 12-143-59W. E½ of E½ W½ of NW¼ N½ of SW¼. Sec. 4-143-N59 West. Ast. Mtg. JH Sharpe to Mid. Nat. Bank, 11-21-B Pd. 7.86.		Reentered on new card 3-22-23 MS.	
[fols. 127 & 128]					
1-27-1923 Addn.	15688	Thomas Stee 2 Mt. 63.18 9-15-23	1,045.48 [1,053.34]*		
	15689	Thomas Stee 11-28-23 Pd. Int. 180.00 (CNX) 9-15-23	3,000.00		
	15637	Thomas Stee et uk. 6-1-24	3,750.00		
				Renewed see Nos. 15688-15689.	
		Mtg. Deed—Thomas Stee et uk to Hanna Sandberg on SE¼ E½ of SW¼ & Lots 6 & 7 Sec. 6 Twp. 143 N Tg. 59W 282 16/100 acres. Ast. Hanna Sandberg to Dazey State Bank. " Dazey Bk. to J. E. J. " J. E. J. to Mid. Nat. Bank.			

[*Figures in brackets erased in copy.]

[fols. 129 & 130]

PLAINTIFF'S EXHIBIT G

Card No. 1
Name Jacobson, J. E.
Dazey, N. D.

Direct Liability

Auth. to Borrow
Coll. Agreement 2-11-21

Ref. Dazey. State Bank Guaranty

Dis. Rate	Date Disct.	No.		Payer	Due	As Promisor Dr.	As Promisor Cr.	As Promisor Bal.	Collateral Dr.	Collateral Cr.	Collateral Bal.
7½	5-13	148405F		End. G. J. J.	9-12	....	....	....	20,000	.....	.....
7	10-12	158138F			12- 6	....	....	....	7,000	.....	27,000
7	12-2	161310		End. Emma B. Jacobson F-12-1-22.....	....	....	....	....	7,500	.....	.....
			1	" F 12-1-22.....	....	....	....	....	5,000	.....	.....
			2	" F 12-1-22.....	....	....	....	....	10,500	.....	.....
			3	" F 12-1-22.....	....	....	....	....	3,000	.....	.....
				148405	....	....	....	....	20,000	.....	.....
	1922			158138	....	....	....	....	7,000	.....	26,000
7	June 27	7682		F	1-16	....	....	....	16,342.90	.....	.....
				611 313 Pt.....	....	....	....	....	.....	1,000	.....
				161311	....	....	....	....	.....	1,500	.....
				161310	....	....	....	....	.....	2,500	.....
				161312	....	....	....	....	.....	5,882	31,460.90
7	Oct. 13	13516		F	10-8-23	....	....	....	2,345.44	.....	33,806.34
7	Dec. 30	17467	to	Emma B. Jacobson..	12-3	....			18,342.90	.....	.....
		8		Ditto	F 12-3	....	Without Recourse		3,500	.....	.....
		9		Ditto	F 12-3	....	J. H. Sharpe		5,000	.....	.....
		70		Ditto	F 12-3	....			4,618	.....	.....
		1			F Dem	1,478.11	....	....	1,478.11	.....	.....
				161312 Bal.	....	....	....	....	.....	4,618	.....
				0	....	....	....	....	.....	5,000	.....
				11	....	....	....	....	.....	3,500	.....
				3	....	....	....	....	.....	2,000	.....
				7682	....	....	....	....	.....	16,342.90	.....
											33,802.34

Ford.
Midland National Bank, Minneapolis

Ford

PLAINTIFF'S EXHIBIT G—Continued

[fols. 131 & 132]

Direct Liability — Deceased 6-26-24

Card No. 2
Name Jacobson, J. E.
Dazey, N. D.

Auth. to Borrow
J. E. Jacobson, Spec. Coll. Agreement 2-11-21
Seed Lien Loans
Ref. Dazey State Bank Guaranty

Dis. Rate	Date Disct.	No.	Payer	As Promisor Dr.	As Promisor Cr.	As Promisor Bal.	Collateral Dr.	Collateral Cr.	Collateral Bal.
	1923				.....	1,478.11	.....	.....	33,806.34
	Jan. 6	....	17471 Pt.	.....	1,000	478.11	.....	.....	.....
	Feb. 7	....	17471 Pt.	.....	160	318.11	.....	.....	.....
	Apr. 11	....	17471 Bal.	.....	318.11	—	.....	.....	.....
	June 23	....	13516 Pt.	.....	Sheriff's Cert.		.....	153.44	.....
	—			.....	"		.....	2,192.00	.....
			17467 Pt.	.....	"		.....	5,301.36	.....
									26,159.54
6	Sept. 7	31622	Mrs. Emma Jacobson & Elsie M. " 3-4-24	150.00	.....	.....	.....	.....	.....
		3	Mrs. Emma Jac-bson & Helen May " 3-4-24	150	.....	.....	.....	.....	.....
	1924	4	Mrs. Emma Jacobson Dorothy M. Jacobson 3-4-24	150	450 —	.....	.....	.....	.....
6	Jan. 7	38841	Elsie M. Jacobson 3-4 Emma B. "	150	.....	.....	.....	.....	.....
		2	Helen M. Jacobson Emma B. " 3-4	150	750 —	.....	.....	.....	.....
6	8	38938	Dorothy M. Jacobson Emma B. " 3-4	150	900 —	.....	.....	.....	.....

6	3-26	43547	Dorothy M. &							
			Emma (Mrs. J. E.)	9-4	309.20	.....	.....	.....	.....	.....
			31624		150—	.....	.....	.....	.....	.....
			38938		150—	909.20	.....	.....	.....	.....
6	Mar. 28	43608	Elsie M. Jacobson							
			Mrs. J. E. "	9-4	309.20	.....	.....	.....	.....	.....
		9	Helen May Jacobson							
			Mrs. J. E. "	9-4	309.20	.....	.....	.....	.....	.....
			31622		150—	.....	.....	.....	.....	.....
			3		150—	.....	.....	.....	.....	.....
			38841		150—	.....	.....	.....	.....	.....
			2		150—	927.60	.....	.....	.....	.....
6	Apr. 21	45002	Only Elsie M.							
			Jacobson	8-21	50—	977.60	.....	.....	.....	.....
6	8-9	52042		12-1	50—	.....	.....	.....	.....	.....
			45002		50—	977.60	.....	.....	.....	.....

Ford.

Midland National Bank, Minneapolis

Ford.

[fols. 133 & 134]

PLAINTIFF'S EXHIBIT H

Direct Liability

Card No. 1
Name Dazey, N. D.
Dazey State Bank
Ref. J. E. Jacobson

Auth. to Borrow 1-28-13
Coll. Agreement 2-28-13
5,000.00 5- 3-17
Guaranty 25,000.00 91-21-21

Dis. Rate	Date Disct.	No.	Payer	Due	As Promisor Dr.	As Promisor Cr.	As Promisor Bal.	Collateral Dr.	Collateral Cr.	Collateral Bal.
	1921		F	12-19	....	....	....	5,000	.....	.....
7	Sept. 19	156646	F	12-12	....	....	....	5,000	.....	10,000
	Oct. 12	158137	158137 Pt.	....	....	....	....	.....	310.80	9,689.20
	Dec. 2	.....	F	1-11	....	....	....	4,689.20	.....	.....
6½	Dec. 23	162559	158137 Bal.	....	....	....	....	.....	4,689.20	.....
			F	1-18	....	....	....	5,000	.....	.....
		60	156646	....	....	....	....	.....	5,000	9,689.20
	1922		F	2-2	....	....	....	5,000	.....	14,689.20
6½	Jan. 3	163118	F	2-10	....	....	....	4,689.20	.....	.....
	12	163661	162559	....	....	....	....	.....	4,689.20	14,689.20
			F	4-18	....	....	....	5,000	.....	.....
6½	18	164049	162590	....	....	....	....	.....	5,000	14,689.20
			F	5-3	....	....	....	5,000	.....	.....
6	Feb. 4	165002	163118	....	....	....	....	.....	5,000	14,689.20
			163661	....	....	....	....	.....	4,689.20	10,000.00
	7	.....	F	5-9	....	....	....	4,000	.....	14,000
6	28	166333	F	4-17	....	....	....	3,000	.....	17,000
6	Mar. 16	1934	1934	....	....	....	....	.....	3,000	14,000
	Apr. 11	.....	F	7-17	....	....	....	5,000	.....	.....
	18	3621	164049	....	....	....	....	.....	5,000	14,000
			F	8-31	....	....	....	5,000	.....	.....
6	28	4191	165002	....	....	....	....	.....	5,000	14,000
			F	9-29	....	....	....	4,000	.....	.....
6	May 25	5751	166333	....	....	....	....	.....	4,000	14,000
6	July 21	9059	F	11-17	....	....	....	5,000	.....	.....
			3621	....	....	....	....	.....	5,000	14,000

Forward

Midland National Bank, Minneapolis

[fols. 135 & 136]

Direct Liability

Card No. 2
Name Dazey, N. D.
Dazey State Bank.
Ref. J. E. Jacobson.

Auth. to Borrow 1-28-13
Coll. Agreement 2-28-13
Guaranty 5,000.00 5- 3-17
25,000.00 9-21-21

10—425

Dis. Rate	Date Disc.	No.	Payer	Due	As Promisor Dr.	As Promisor Cr.	As Promisor Bal.	Collateral Dr.	Collateral Cr.	Collateral Bal.
	1922					....	....	.....	.....	14,000
6	Aug. 26	10979	F	10-25	....	....	....	8,000	.....	.....
			4191	....	....	....	....	.....	5,000	17,000
6	Sept. 29	12700	F	12-28	....	....	....	4,000	.....	.....
			5751	....	....	....	....	.....	4,000	17,000
6	Oct .2	12801	F	1-30	....	....	....	2,344	.....	19,344
6	12	13477	F	2-13	....	....	....	1,500	.....	20,844
6	13	13551	F End. J. E. Jacobson	1-11	....	....	....	7,500	.....	28,344
6	25	14150	F	12-26	....	....	....	8,000	.....	.....
			10979	....	....	....	....	.....	8,000	28,344
	Nov. 6	14752	F	11-21	....	....	....	5,000	.....	33,344
6	15	15286	F	2-13	....	....	....	1,500	.....	34,844
6	20	15487	F	1-22	....	....	....	5,000	.....	.....
		8	F	1-16	....	....	....	3,000	.....	.....
			14752	....	....	....		.....	5,000	.....
			9059	....	....	....	....	.....	5,000	32,844
	Dec. 1 1923		15487	....	....	....	....	.....	5,000	27,844
6	Jan. 9	17912	C	Denn.	....	....	....	12,000	.....	.....
			12700	....	....	....	....	.....	4,000	.....
			14150	....	....	....	....	.....	8,000	27,844
6	13	18108	F	4-11	....	....	....	7,500	.....	.....
			13551	....	....	....	....	.....	7,500	27,844
	15	17912	Pt.	....	....	....	....	.....	125	27,719
6	16	18277	F	4-16	....	....	....	3,000	.....	.....
			15488	....	....	....	....	.....	3,000	27,719
						Ford.			Ford.	

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PLAINTIFF'S EXHIBIT H—Continued

Midland National Bank, Minneapolis.

[fols. 137 & 138]

Direct Liability

Card No. 3
Name Jacobson, J. E.
Dazey, N. D.

J. E. Jacobson Spec.
Secd. Lien Loan
Ref. Dazey State Bank, N. D.

Deceased 6-26-24
Auth. to Borrow
Coll. Agreement 2-11-21

Dis. Rate	Date Disc.	No.	Payer	Due	As Promisor Dr.	As Promisor Cr.	As Promisor Bal.	Collateral Dr.	Collateral Cr.	Collateral Bal.
	1924 Bt. Ford.					.....	977.60	.....	.....	26,159.54
6	Sept. 4	52836	Elsie M. Jacobson.....		.....	.....	.....	.....	.....	.....
			Mrs. Emma B. " 2-19-25		309.20	.....	.....	.....	.....	.....
		7	Mrs. Emma B. Jacobson & Helen " 2-19-25		309.20	.....	.....	.....	.....	.....
		8	Mrs. Emma B. Jacobson & Dorothy M. " 2-19-25		309.20	.....	.....	.....	.....	.....
			43547		.....	309.20	.....	.....	.....	.....
			43608		.....	309.20	.....	.....	.....	.....
			9		.....	309.20	977.60	.....	.....	.....
	Nov. 10 1925	....	52042		.....	50—	927.60	.....	.....	.....
	Feb. 16	....	52837 Pt.....		.....	9.20	918.40	.....	.....	.....
	17	....	52836 Pt.....		.....	9.20	909.20	.....	.....	.....
6	19	60870	Dorothy M. Jacobson 8-19		309.05	.....	.....	.....	.....	.....
			52838		.....	309.20	909.05	.....	.....	.....
6	2-26	61154	Elsie & Mrs. J. E. 8-19		309.05	.....	.....	.....	.....	.....
			52836		.....	300—	918.10	.....	.....	.....

6	Mar. 3	61453	Helen May Jacobson et al.	4-20	303—	.....	.....	.....	.....	.....
			52837 Bal.		.....	300—	921.10	.....	.....	.....
6	May 5	63471	Helen May Jacobson		.....	....	....	.....	.....	.....
			Mrs. Emma "	10-20	309.15	.....	.....	.....	.....	.....
			61453		.....	303—	927.25	.....	.....	.....
	June 23		61154		.....	25—	902.25	.....	.....	.....
6	July 9	67901	Elsie M. Jacobson		.....	.....	.....	.....	.....	.....
			Emma B. "	12-23	283.38	.....	.....	.....	.....	.....
			61154		.....	284.05	901.58	.....	.....	.....
6	Aug. 28	70170	Emma Jacobson	2-19	309.20	.....	.....	.....	.....	.....
			60870		.....	309.05	901.73	.....	.....	.....
	Oct. 5	....	64571 Pt.		.....	.....	25—	876.73	.....	.....
	9	....	67901 Pt.		.....	25—	851.73	.....	.....	.....
						Ford.				

(On back of Card No. 3.)

Card No. 4. (Same Heading as Card Number 3 above.)

			Bt. Ford.								
6	Oct. 14	72830	Helen M. & Mrs. Emma B. Jacobson	4-20-26	283.34	.....	851.73	.....	.....	26,159.54
			64571 Bal.		.....	284.15	850.92	.....	.....	.....

[fols. 139 & 140]

PLAINTIFF'S EXHIBIT I

Direct Liability

Card No. 3
Name—Dazey, N. D.
Dazey State Bank
Ref. J. E. Jacobson

Auth. to Borrow 1-28-13
Coll. Agreement 2-28-13 2-7-23
Guaranty 25,000.00 9-21-21
5,000.00 5-3-17

Dis. Rate	Date Disc.	No.	Payer	Due	As Promisor Dr.	As Promisor Cr.	As Promisor Bal.	Collateral Dr.	Collateral Cr.	Collateral Bal.
	1923				....	....	....	.....	.....	27,719
	Jan. 31	19041	C	Dem	....	....	....	2,344	.....	.....
		12801	.....	....	....	....	....	.....	2,344	27,719
6	Feb. 7	19385	C	Dem	....	....	....	20,000	.....	47,719
6	20	20051	C	Dem	....	....	....	3,000	.....	.....
		13477	.....	....	....	....	....	.....	1,500	.....
		15286	.....	....	....	....	....	.....	1,500	47,719
	26	.....	17912 Pt.....	....	....	....	....	.....	1,851.43	45,867.57
6	27	20425	C	Dem	....	....	....	800	.....	46,727.57
	Mar. 17	.....	17912 Pt.....	....	....	....	....	.....	790.44	45,937.13
	19	.....	17912 Pt.....	....	....	....	....	.....	1,909.85	.....
			Pt.....	....	....	....	....	.....	1,082.79	.....
			Pt.....	....	....	....	....	.....	875.65	42,008.84
	22	.....	17912 Pt.....	....	....	....	....	.....	1,563.99	.....
			Pt.....	....	....	....	....	.....	89.52	40,355.33
	Apr. 2	.....	17912 Pt.....	....	....	....	....	.....	2,108.82	38,246.51
	6	.....	17912 Pt.....	....	....	....	....	.....	163.72	38,083.79
	9	.....	17912 Pt.....	....	....	....	....	.....	110	.....
						....	....	.....	127.09	37,845.70
	11	.....	17912 Pt.....	....	....	....	....	.....	401	.....
						....	....	.....	100	37,344.70
	12	.....	17912 Pt.....	....	....	....	....	.....	62.45	37,282.25
	13	.....	17912 Pt.....	....	....	....	....	.....	420	.....
			Pt.....	....	....	....	....	.....	69.10	36,793.15
	14	.....	17912 Pt.....	....	....	....	....	.....	50	36,743.15

Ford.

Midland National Bank, Minneapolis.

[fols. 141 & 142]

Direct Liability

Card No. 4
Name Dazey, N. D.
Dazey State Bank
Ref. J. E. Jacobson

Auth. to Borrow 1-28-13
Coll. Agreement 2-28-13 2-7-23
Guaranty 25,000.00 9-21-21
5,000.00 5-2-17

Dis. Rate	Date Disc.	No.	Payer	Due	As Promisor Dr.	As Promisor Cr.	As Promisor Bal.	Collateral Dr.	Collateral Cr.	Collateral Bal.
	1923									
	Apr. 19	.....	17912 Pt.....	....	....	....	....	.....	.....	36,743.15
	28	.....	17912 Bal.....	....	....	....	....	.....	35.00	36,708.15
			19041 Pt.....	....	....	....	....	.....	4.15	.....
	30	.....	19041 Pt.....	....	....	....	....	.....	37.69	36,666.31
	May 2	.....	19041 Pt.....	....	....	....	....	.....	61	36,605.31
	3	.....	19041 Pt.....	....	....	....	....	.....	29.44	36,575.87
	12	.....	19041 Pt.....	....	....	....	....	.....	375.47	36,200.40
	15	.....	19041 Pt.....	....	....	....	....	.....	529.76	35,670.64
	21	.....	19041 Pt.....	....	....	....	....	.....	354.50	35,316.14
	June 26	.....	19041 Bal.....	....	....	....	....	.....	237.72	35,078.42
			19385 Pt.....	....	....	....	....	.....	718.42	.....
	July 14	.....	19385 Pt.....	....	....	....	....	Sheriff's Cert.	14,276.42	20,083.58
	16	.....	19385 Pt.....	....	....	....	....	.....	775.86	19,307.72
	21	.....	19385 Pt.....	....	....	....	....	.....	29.50	19,278.22
8	14	.....	Pt.....	....	....	....	....	.....	100	19,178.22
	21	.....	Pt.....	....	....	....	....	.....	9.32	19,168.90
	30	.....	19385 Pt.....	....	....	....	....	.....	32	19,136.90
	Sept. 8	.....	19385 Pt.....	....	....	....	....	.....	73.16	19,063.74
	12	.....	19385 Pt.....	....	....	....	....	.....	54.50	19,009.24
						....	....	.....	341.25	.....
	17	.....	19385 Pt.....	....	....	....	....	.....	80—	.....
						....	....	.....	60—	18,527.99
	20	.....	19385 Pt.....	....	....	....	....	.....	150	.....
						....	....	.....	15	18,362.99
						....	....	.....	75	18,287.99

Ford.

PLAINTIFF'S EXHIBIT I—Continued

[fol. 143]

(Closed 2-26-23)

Card No. 5
Name Dazey, N. D.
Dazey State Bank
Ref. J. E. Jacobson

Auth. to Borrow 1-28-13
Coll. Agreement 2-28-13, 2-7-23
Guaranty $25,000.00 9-21-21
5,000.00 5-2-17

Dis. Rate	Date Disct.	No.	Payer	Due	As Promisor Dr.	As Promisor Cr.	As Promisor Bal.	Collateral Dr.	Collateral Cr.	Collateral Bal.
	1923									18,287.99
	Bt. Ford.					....	....	.....	.....	18,246.24
	Sept. 21	.....	19385 Pt.....	....	....	....	....	.....	41.75	18,192.24
	Oct. 4	.....	19385 Pt.....	....	....	....	....	.....	54.00	18,087.44
	5	.....	19385 Pt.....	....	....	....	....	.....	104.80	17,793.14
	11	.....	19385 Pt.....	....	....	....	....	.....	294.30	.....
	13	.....	19385 Pt.....	....	....	....	....	.....	64.70	17,598.44
						....	....	.....	130.00	17,428.79
	15	.....	Pt.....	....	....	....	....	.....	169.65	.....
	17	.....	[19385 Pt.]*.....	....	....	....	....	.....	155.10	17,119.66
						....	....	.....	154.03	17,068.66
	20	.....	19385 Pt.....	....	....	....	....	.....	51.00	16,651.23
	1924		19385 Pt.....	....	....	....	....	.....	417.43	
	Nov. 25	.....	18277	....	....				3,000.00	.....
			18108	....	....	....		Transferred to	7,500.00	.....
			20051	....	....	....		Stocks, Secs.	3,000.00	.....
			20425	....	....	....		& Claims.	860.00	.....
			19385 Bal.....	———	....	....			2,291.23	——0——

[fol. 144] PLAINTIFF'S EXHIBIT J

Form 258 1M 11-23

Minneapolis, Minn., Sept. 21, 1921.

In Consideration of the credit given and to be given by the Midland National Bank of Minneapolis to Dazey State Bank, Dazey, N. D. hereinafter called the Debtor, I guarantee the payment, at maturity, of all promissory notes, checks, drafts and other bills of exchange, overdrafts and other indebtedness upon, or for which, said Debtor is, or shall hereafter become, obligated to said Bank, whether as a maker, drawer, endorser, guarantor, surety or otherwise. And whereas, said Debtor may transfer to said Bank by delivery without endorsement, or by endorsement without recourse, promissory notes, certificates of deposit, checks, drafts, bonds and other written obligations, negotiable and non-negotiable, and receive payment therefor, or credit on account thereof, from the Bank, I also guarantee payment at maturity of all such promissory notes, certificates of deposit, checks, drafts, bonds and other written obligations. Presentment, demand, protest and notice of protest of any promissory notes, certificates of deposit, check, draft, other bill of exchange and bond hereinbefore referred to is waived; and no extension of the time of payment, or the release or surrender of other security for any such obligation or indebtedness shall affect my liability upon this guarantee, but my liability hereon shall not at any time exceed, Twenty-five thousand Dollars ($25,000.00).

I reserve the right to terminate my liability on this guarantee by written notice thereof to the Bank, except as to obligations and indebtedness incurred by the Debtor prior to such notice: but I agree nothing shall affect my liability on this guarantee except such notice, or the surrender or cancellation of this guarantee by the Bank.

J. E. Jacobson.

Discount Sept. 27, 1921.
S. F. O. P. Teller.

PLAINTIFF'S EXHIBIT K

Minneapolis, Minn., May 3, 1917.

In consideration of the credit given and to be given by The Scandinavian American National Bank of Min-

[fol. 147] neapolis to Dazey State Bank, Dazey, North Dakota, hereinafter called the Debtor, I guarantee the payment, at maturity, of all promissory notes, checks, drafts and other bills of exchange, overdrafts and other indebtedness upon, or for which, said Debtor is, or shall hereafter become, obligated to said Bank, whether as a maker, drawer, endorser, guarantor, surety or otherwise. And whereas, said Debtor may transfer to said Bank by delivery without endorsement, or by endorsement without recourse, promissory notes, certificates of deposit, checks, drafts, bonds and other written obligations, negotiable and non-negotiable, and receive payment therefor, or credit on account thereof, from the Bank, I also guarantee payment at maturity of all such promissory notes, certificates of deposit, checks, drafts, bonds and other written obligations. Presentment, demand, protest and notice of protest of any promissory note, certificate of deposit, check, draft, other bill of exchange and bond hereinbefore referred to is waived; and no extension of the time of payment, or the release of surrender of other security for any such obligation or indebtedness, shall affect my liability upon this guarantee, but my liability hereon shall not at any time exceed Five thousand Dollars ($5,000.00).

I reserve the right to terminate my liability on this guarantee by written notice thereof to the Bank, except as to obligations and indebtedness incurred by the Debtor prior to such notice; but I agree nothing shall affect my liability on this guarantee except such notice, or the surrender or cancellation of this guarantee by the bank.

J. E. Jacobson.

WM.
M (Discount July 3, 1917, Teller).
P.

PLAINTIFF'S EXHIBIT L

Form 247, 1M, 7-22.

Know all men by these presents, That the undersigned in consideration of financial accommodations given or to be given or continued to the undersigned by The Midland National Bank of Minneapolis, Minnesota, hereby agree

with the said Bank that whenever the undersigned shall become or remain directly or contingently indebted to the said Bank for money lent or for money paid for the use or account of the undersigned or for any overdraft or upon [fol. 146] any endorsement, draft, guarantee or in any other manner whatsoever or upon any other claim, the said Bank shall then and thereafter have the following rights, in addition to those created by the circumstances from which such indebtedness may arise, against the undersigned, or his or their executors, administrators or assigns, namely;

1. All securities deposited by the undersigned with said Bank, as collateral to any such loan or indebtedness of the undersigned to said Bank, shall also be held by said Bank as security for any other liability of the undersigned to said Bank, whether then existing or thereafter contracted; and said bank shall have a lien upon any balance of the deposit account of the undersigned with said Bank existing from time to time, and upon all property of the undersigned of every description left with said Bank for safe keeping or otherwise, or coming to the hands of said Bank in any way as security for any liability of the undersigned to said Bank now existing or hereafter contracted.

2. Said Bank shall at all times have the right to require from the undersigned that there shall be lodged with said Bank as security for all existing liabilities of the undersigned to said Bank, approved collateral securities to an amount satisfactory to said Bank, and may call for additional collateral security, whenever the said collaterals, or such other property as shall be deposited in substitution therefor, shall depreciate in value, and upon the failure of the undersigned at all times to keep a margin of securities with said Bank for such liabilities of the undersigned, satisfactory to said Bank, or upon any failure in business or making of an insolvent assignment by the undersigned, then and in either event all liabilities of the undersigned to said Bank shall, at the option of said Bank, become immediately due and payable notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

3. Upon failure of the undersigned either to pay any indebtedness to said Bank when becoming or made due, or to

keep up the margin of collateral securities above provided for, then and in either event said Bank may immediately without advertisement and without notice to the undersigned or demanding payment, sell any of the securities held by it as against any or all of the liabilities of the undersigned, at private sale or Broker's Board or otherwise, and apply the proceeds of such sale as far as needed toward the payment of any or all of such liabilities together [fol. 147] with interest and expense of sale, holding the undersigned responsible for any deficiency remaining unpaid after such application. If any such sale be at Broker's Board or at public auction said Bank may itself be a purchaser at such sale, free from any right or equity or redemption of the undersigned, such right and equity being hereby expressly waived and released. Upon default as aforesaid, said Bank may also apply toward the payment of the said liabilities all balances of any deposit account of the undersigned with said Bank then existing.

4. It is further agreed that said Bank may use its best judgment in granting extension or securing or forcing the collection of said collaterals, and that the undersigned will pay all reasonable charges and expenses incurred in renewing, securing or collecting said collaterals; that said Bank shall not be under any obligation to notify the makers or endorsers of any of said collaterals, or to institute any proceeding to collect said security, but may do so at its option.

And the undersigned does hereby release the said Bank from all liability on account of the insolvency of the makers, or endorsers, or sureties of any of said collaterals, or on account of any omission on the part of said Bank to notify, or to proceed against said makers, endorsers or sureties.

It is further agreed that these presents shall constitute a continuing agreement, applying to any and all future as well as existing transactions between the undersigned and said Bank.

J. E. Jacobson.

Dated Minneapolis, the 11th day of February, 1921.

S (Discount Feb. 15, 1921, Teller)

PLAINTIFF'S EXHIBIT M

Sheriff's Certificate of Sale of Collaterals

STATE OF MINNESOTA,
County of Hennepin, ss:

I, Earl Brown, Sheriff of the County of Hennepin and State of Minnesota, do hereby certify that at the City of Minneapolis, in said County of Hennepin, on the 12th day of June, 1923, I served the notice of sale hereto attached upon the Liberty State Bank of Minneapolis, personally, by [fol. 148] then and there handing to and leaving with C. R. Anderson, President of said bank, a true and correct copy thereof; that on said day I was unable to find J. E. Jacobson of Dazey, North Dakota, or the Bank of Commerce & Savings of Duluth, Minnesota, within my said County, and I duly determined they could not be found within said Hennepin County; that on said day I posted said notice in each of the three most public places in the City of Minneapolis, in said County, to-wit: One copy thereof on the bulletin board at the Fourth Street entrance of the Court House and City Hall building, one copy thereof on the bulletin board at the Fifth Street entrance of said building, and one copy thereof on the bulletin board at Fire Station "A", number 19 and 21 North Fourth Street; that at the time and place specified in said notice of sale, to-wit: at my main office or sales room in the Court House in said City of Minneapolis, County of Hennepin and State of Minnesota, on Saturday the 23rd day of June, 1923 at 10:30 o'clock in the forenoon, I did pursuant to said notice and a power of sale from said J. E. Jacbson, sell all the certificates of deposits, and promissory notes, together with the securities securing the payment thereof, and the Sheriff's certificate described in Exhibit "A" of said notice of sale; that I first offered for sale each of said certificates of deposit, promissory notes, together with the securities securing the payment thereof, and said Sheriff's certificates separately, and receiving no bid for the same, I thereupon offered for sale all of said certificates of deposit, promissory notes, together with the securities securing the payment thereof, and said Sheriff's certificate in one lot and sold the same to the Midland National Bank of Minneapolis for the sum of Seven Thousand Five Hun-

dred Dollars ($7500.00), it being the highest bidder and said sum being the best sum bid for the same.

I further certify that said sale was openly, honestly and fairly made and conducted; that said collateral securities were in view at the time of sale; that the following expenses were necessarily insur-ed in making the sale, to-wit:

Sheriff's fees for selling the property	$3.00
Sheriff's fees for serving and attempting to serve and posting notices	3.64
	$6.64

I further certify that the proceeds of sale, to-wit; the sum of $7,500, have paid said expenses of sale and have [fol. 149] paid the pledges, The Midland National Bank of Minneapolis, the sum of $7,593.36.

Earl Brown, Sheriff of Hennepin County, Minnesota.
By Benj. A. Ege (Signed) Deputy Sheriff.

In Presence of
W. Roy Anderson (Signed) Arthur E. Munson (Signed.)

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 23rd day of June, A. D. 1923, before me personally appeared Benj. A. Ege, to me known to be the same person who executed the foregoing instrument and to be deputy sheriff of the County of Hennepin in the State of Minnesota, and he acknowledged the execution of said instrument to be the free act and deed of said Sheriff.

Arthur E. Munson, Notary Public, Hennepin County, Minnesota. My commission expires Apr. 6, 1926. (Seal.)

STATE OF MINNESOTA,
County of Hennepin, ss:

I hereby certify and return, that on the 12th day of June, A. D. 1923, at the City of Minneapolis, said County and State, I posted the notice of sale, the original of which is hereto attached, in each of the three most public places in said City of Minneapolis, to-wit; one copy of said notice on the bulletin board at Fourth Street entrance of the Court

House and City Hall Building, one copy of said Notice on the Bulletin Board at the Fifth Street Entrance of said Building, and one copy of said Notice on the Bulletin Board at Fire Station "A" number 19 and 21 North Fourth Street, all three being in said Hennepin County, and State aforesaid.

Sheriff's Fees, posting	$1.00
Travel	.16
Total	1.16

Earl Brown, Sheriff of Hennepin County, Minn. By C. A. McGuire (Signed), Deputy Sheriff.

[fol. 150] STATE OF MINNESOTA,
County of Hennepin, ss:

I hereby certify and return, that at the City of Minneapolis, County and State aforesaid, on the 12th day of June, A. D. 1923, I served the notice hereto attached upon the within named Liberty State Bank of Minneapolis, personally by then and there handing to and leaving with C. R. Anderson President of said Bank, a true and correct copy thereof.

Dated this 13th day of June, 1923.

Sheriff's fee—service	$1.00
Copy	....
Travel	.48
Total	$1.48

Earl Brown (Signed) Sheriff of Hennepin County, Minn. B. A. H. Montour (Signed) Deputy Sheriff.

STATE OF MINNESOTA,
County of Hennepin, ss:

I hereby certify and return, that after due and diligent search I have been unable to find the within named defendant J. E. Jacobson, Dazey, North Dakota—Bank of Commerce & Savings, Duluth, Minn. within my said County, and I have duly determined that defendant aforesaid cannot be found within said Hennepin County.

Dated this 12th day of June, 1923.

Sheriff's fees. Service $1 00
Travel ....

Total $1 00

Earl Brown (Signed) Sheriff of Hennepin County, Minn. By C. A. McGuire (Signed) Deputy Sheriff.

Notice of Sale of Collaterals

To J. E. Jacobson, Dazey, North Dakota; Bank of Commerce & Savings, Duluth, Minnesota; Liberty State Bank of Minneapolis, Minnesota; and all others whom it may concern.

[fol. 151] Whereas the above named J. E. Jacobson is indebted to the Midland National Bank of Minneapolis upon the following described promissory notes:

	Date	Maturity	Principal amount	Interest
(1)	10- 7-22	10-7-23	$2,192.00	7% from date
(2)	12- 1-22	12-1-23	18,342.90	7% from date
(3)	12- 1-22	12-1-23	3,500.00	7% from date
(4)	12- 1-22	12-1-23	5,000.00	7% from date
(5)	12- 1-22	12-1-23	4,618.00	7% from date
(The above notes (2), (3), (4) and (5) are payable to the order of J. H. Sharpe, and are endorsed by said Sharpe in Blank.)				
(6)	4- 4-23	Demand	1,000.00	6% from date
(7)	5- 8-23	Demand	21.60	7% from date
(8)	4- 6-23	10-1-23	81.00	6% from date
(9)	4- 6-23	10-1-23	257.00	6% from date
(10)	4-10-23	10-1-23	174.66	6% from date
(11)	5- 9-23	9-15-23	172.50	6% from date
(This note is also signed by Mike Sorenson.)				
(12)	5-10-23	10-1-23	121.00	8% from date
(13)	5-10-23	10-1-23	233.50	8% from date
(14)	12- 1-23	12-1-23	4,000.00	7% from date

(The above note is payable to the order of J. H. Sharpe and endorsed in blank.)

and

Whereas, said J. E. Jacobson is also indebted to the said Midland National Bank in the additional sum of $25,000.00, as guarantor for the Dazey State Bank of Dazey, North Dakota, under a guaranty in writing dated September 21st, 1923, which indebtedness of said Dazey State Bank is now

past due and unpaid, although payment thereof has often been demanded, and

Whereas, as security for the payment of the principal and interest of all of the above mentioned indebtedness, said J. E. Jacobson pledged to the said Midland National Bank, the promissory notes, (together with certain securities securing the payment of said promissory notes) and certificates of deposit listed in Exhibit "A" which is attached to this Notice and made a part hereof, and

Whereas, a mortgage securing one of said collateral notes has been foreclosed and a sheriff's certificate has been issued under such foreclosure to said Midland National Bank, and

Whereas, under a written agreement entered into by the said J. E. Jacobson and said Midland National Bank, which agreement bears date February 11th, 1921, said J. E. Jacobson has authorized and empowered said Midland Na-
[fol. 152] tional Bank, upon failure of said J. E. Jacobson to pay any indebtedness to said Bank when becoming or made due, to sell any of the securities held by it as against any or all of the liabilities of said J. E. Jacobson, and to apply the proceeds of such sale toward the payment of any or all of such liabilities, together with interest and the expense of sale, and

Whereas, said J. E. Jacobson is in default and has failed to pay certain of his indebtedness to said Midland National Bank which is overdue and unpaid, although payment thereof has often been demanded,

Now, Therefore, notice is hereby given that all of said collateral notes and certificates of deposit pledged by J. E. Jacobson as aforesaid, together with all securities accompanying the same, and together with said sheriff's certificate, will be sold at public sale to the highest bidder for cash, by the Sheriff of Hennepin County and State of Minnesota, in the main office or sales room of said Sheriff, in the Court House in the City of Minneapolis, County of Hennepin and State of Minnesota, on Saturday, the 23rd day of June, 1923, at 10:30 o'clock in the forenoon, the proceeds of this sale to be applied as follows: First, to pay the costs and expenses of such sale; second, to pay the principal of the above described notes of said J. E. Jacobson in the order in which they are listed in this notice;

third, to pay the interest accrued at the date of sale on said notes in the order in which said notes are listed in this notice; fourth, to pay the indebtedness of said Dazey State Bank, guaranteed by said J. E. Jacobson as aforesaid.

Dated June 8, 1923.

Midland National Bank of Minneapolis, Pledgee.
Ueland & Ueland (Signed), Attorneys for Pledgee,
401 New York Life Bldg., Minneapolis, Minnesota.

EXHIBIT "A"

Certificate of Deposit of the Dazey State Bank of Dazey, North Dakota, No. 4477, dated September 10, 1922, due September 10, 1923, for $5,000.00, bearing interest at 6% from date.

[fol. 153] Certificate of Deposit of the Dazey State Bank of Dazey, North Dakota, No. 4479, dated October 10, 1922, due October 10, 1923, for $5,000.00, bearing interest at the rate of 6% from date.

Certificate of Deposit of the Dazey State Bank of Dazey, North Dakota, No. 4494, dated October 31, 1922, due October 31, 1293, for $5,000.00, bearing interest at the rate of 6% from date.

Certificate of Deposit of the Dazey State Bank of Dazey, North Dakota, No. 4499, dated November 24, 1922, due November 30, 1923 for $5,000.00, bearing interest at the rate of 6% from date.

Certificate of Deposit of the Dazey State Bank of Dazey, North Dakota, No. 4500, dated November 10, 1922, due November 10, 1923, for $5,000.00, bearing interest at the rate of 6% from date.

Promissory note of Carline F. M. Wilk and Martin E. L. Wilk, dated January 16, 1922, due January 16, 1927, for $16,342.90, together with interest thereon from January 16th, 1922 at the rate of 7% per annum. This indebtedness purports to be secured by Chattel Mortgage dated April 28, 1923, filed on April 28, 1923, in Clay County, Minnesota, covering 79 head of cattle, 55 head of horses, some poultry and miscellaneous farm machinery and equipment, which mortgage is subject to prior encumbrances of

approximately $3,500.00; by Real Estate Mortgage dated May 2, 1922, recorded in Book 110 of Mortgages, page 330, in Clay County, Minn. on the N. E. ¼ of Section 1, and all that portion of the N. W. ¼ of Section 3, lying on the left side of the Buffalo River, the N. E. ¼ of Section 5, the N. E. ¼ of Section 8, and the N. ½ of Section 9, excepting all that part of the N. E. ¼ of Section 9 east of the Buffalo River, in Township 14, Range 48; also the S. E. ¼ of Section 32, the S. ½ of Section 33, that portion of the N. W. ¼ of Section 33 lying south of the Buffalo River, and a parcel situated in the S. W. corner of the N. E. ¼ of Section 33 on the left bank of the Buffalo River going down stream, and being between said stream and line bounding said N. E. ¼ and intersecting at the S. E. corner of said N. E. ¼, and all that portion of Section 34 on the left bank of said Buffalo River going down stream, all in Township 142, Range 48 also 15 acres in the S. E. ¼ of the N. E. ¼ of Section 32, in Township 142, Range 48, Clay County, Minnesota. This mortgage is subject to several prior encumbrances.

Two promissory notes of Thomas Stee, both dated January 13, 1923, one of which is due September 15, 1923 and [fol. 154] is for $1,053.34, and one of which is due September 15, 1924, and is for $3,000.00, on which notes there is now owing $4,053.34 together with interest thereon from January 13, 1923 at the rate of 8% per annum. Earlier note of which the above notes are renewals, dated June 1st, 1921. This indebtedness purports to be secured by Chattel mortgage dated January 13, 1923, filed on January 14, 1923, in Barnes County, North Dakota, covering 12 head of cattle and miscellaneous farm machinery, and an undivided one-half interest in the 1023 crop on the S. ½ of Section 6, Township 143, Range 57, Barnes County, North Dakota.

First mortgage note of Peter Grotting, Petra Grotting and John Grotting, dated January 29th, 1920, due February 1, 1925, for $8,500.00, together with five interest coupons payable on the 1st days of February, 1921, 1922, 1923, 1924 and 1924 for $512.84, $510.00, $510.00, $510.00 and $510.00, respectively. This indebtedness purports to be secured by Real Estate Mortgage Dated January 29,

1921, recorded in Book 10 of Mortgages, page 73, in Griggs County, North Dakota, on the N. ½ of Section 25, in Township 144, Range 60, Griggs County, North Dakota. The title of the mortgagors to the mortgaged premises appears to be defective.

Promissory note of Nikolai Skjerret, dated March 14, 1916, due April 1, 1924, for $11,650.00, on which there is now owing $10,000.00, together with interest thereon from October 21, 1919, at the rate of 7% per annum.

Four promissory notes of John Mickelson and Hazelle C. Mickelson, all dated October 10, 1918, and due November 1, 1921, November 1, 1922, November 1, 1923, and November 1, 1924, and for the principal sums of $500.00, $500.00, $500.00 and $600.00, respectively, on which there is now owing $2,100.00, together with interest thereon from October 10, 1918 at the rate of 10% per annum.

Promissory note of Jonas Ose, dated September 9, 1921, due March 9, 1923, for $3,000.00, on which there is now owing $3,000.00 together with interest thereon from September 9, 1921, at the rate of 10% per annum.

Promissory note of Jacob L. Miklethun and Hannah Miklethun, dated November 10, 1920, due December 1, 1921, for $4,500.00, on which there is now owing $4,500.00, together with interest thereon from November 10, 1920, at the rate of 10% per annum.

[fol. 155] Promissory note of Nels Myhrhaug and Abelene Myhrhaug, dated December 15, 1920, due May 15, 1921, for $4,000.00, on which there is now owing $4,000.00, together with interest thereon from December 15, 1920.

Promissory note of Alfred Fogderud dated December 31, 1917, due December 1, 1922, for $6,000.00, on which there is now owing $6,000.00, together with interest thereon from Nov. 22, 1919.

Two promissory notes of Oscar Mosher and Sophia Mosher, both dated January 13, 1923, both due on demand, and both for $5,000.00, on which there is now due $10,000.00, together with interest thereon from January 13, 1923, at the rate of 10% per annum. These notes purport to be secured by Policy No. 18360 in the Dakota Life Insurance Company of Watertown, South Dakota, on the life of Oscar Mosher, in the amount of $10,000.00. The Dakota Life Insurance Company has served notice demanding the can-

cellation of the above policy on the ground that it was obtained through misrepresentation.

Certificate of the sheriff of Griggs County, North Dakota of Mortgage Foreclosure Sale, dated March 17, 1923, covering the N. E. ¼ of Section 18, in Township 144, Range 59, in Griggs County, North Dakota, and recites a consideration of $2,342.94. The mortgage under the foreclosure of which said sheriff's Certificate was issued was given subject to a prior encumbrance of $3,500.00. This certificate was issued pursuant to the foreclosure of the mortgage note of Carl A. Nelson, which was held as collateral security in the principal amount of $2,000.75 which matured October 1st 1922.

DEFENDANT'S EXHIBIT 1

135A Chattel Mortgage, North Dakota, 1917 Form

Know All Men By These Presents, That I, Sophia Mosher, by occupation a farmer of Dazey, postoffice, County of Barnes, State of North Dakota, mortgagor, for the purpose of securing the payment of Twenty Hundred Ten 86/100 Dollars, and interest at the rate of ten per cent, per annum, according to the conditions of one promissory note payable at office of mortgagee herein named, to-wit:

One note dated Jan. 13, 1923 for $2,010 86/100 due Oct. 15, 1923.

One note date —— —, 192–, for $—, due —— —, 192–.
One noted dated —— —, 192–, for $—, due —— —, 192–.

[fol. 156] also all advances, moneys, goods, credits, guaranties or overdrafts, (in a sum not to exceed $—) advanced to me or for me by said moregagee, do hereby mortgage to Dazey State Bank, a corporation at Dazey, Barnes Co. State of North Dakota, mortgagee, all that certain personal property situated on S. E. ¼ of Section 2, Township 143 Range 59, in Barnes County, N. D. now in my possession, owned by me and free from all incumbrance, to-wit:

One McCormick 7 ft. cut binder (right hand) and complete, One end spring buggy with shaft, One side spring buggy with pole, One two seated surry, 3 Bob sleighs, One 10 ft. McCormick rake, One McCormick 6½ ft. cut

binder complete, One John Deere sulky plow, One walking 6 shoe cultivator, Two Havanna 16 shoe grain drills complete, One John Deere triple gang plow complete, One Gopher Feed grinder, One Moline wagon 3¼ inch tire with 100 bus. grain tank complete, One Moline wagon 3¼ inch tire with 70 bus. grain tank complete, One 2½ H. P. P. & O. Gasoline Engine.

Also the following described livestock, which is all of the kind now owned by me, whether in excess of the number or not:

Number	Color	Kind of property	Age	Weight	Marks, name or brands	From whom bo't, value
....	....	.. ....	....	....	.....	.....

together with all increases of said livestock. Also any undivided two-third interest in all the crops of every kind, including grass, which have been, or may hereafter be grown, planted, cultivated or harvested during the year A. D. 1923, to-wit: on the South West quarter Section One; South East quarter of Section No. 2, Township No. 143, Range No. 59, in Barnes County, North Dakota; together with any and all hail insurance placed on, carried, or received in case of loss, total or partial, on grain herein mortgaged.

Provided, that if the undersigned shall pay all of said indebtedness and interest, then this mortgage shall be void, and it is hereby agreed, that if default be made in the payment of said debt or either of said notes or any part thereof, or any attempt be made to remove or dispose of said property, or any part thereof, or at any time the said mortgagee, or assigns, shall deem the said debt unsafe or insecure, he is hereby authorized by himself, his attorneys or agents to enter upon the premises where said property may be, remove and sell the same, in the manner and with the notice [fol. 157] prescribed by the laws of North Dakota, and out of the proceeds retain the amount then due and owing on said debt, with the expenses attending the sale, including attorney fees prescribed by law; and should default be made in the payment of said promissory note or notes, or either of them or any part thereof, the whole of said debt shall become immediately due and payable, and said Mortgagee, his attorneys, agents or assigns, may commence

action for the recovery of the whole of said debt, or proceed to foreclose this mortgage as above provided in case of default upon maturity of the whole of the debt secured hereby, and the delivery of his mortgage to an attorney for the purpose of foreclosure shall be considered sufficient to make said fees due and payable, rendering to the undersigned the surplus after the whole of said debt shall have been paid, with charges aforesaid.

It is hereby stipulated, by and between the parties hereto that in case of default as above provided, Mortgagee may enter upon the premises wherever the harvested crops of any kind, nature or description, covered by this mortgage may be found, remove and sell the same in any usual market therefor at the time, in the usual manner, at the market price thereof in such market and without the notice prescribed by Section 8125 and Section 8126 of the Compiled Laws of 1913; and out of the proceeds retain the usual and reasonable charges for such transportation and sale of such crops, in addition to the principal and interest of such debt.

In case of foreclosure of this mortgage, sale shall be held at Dazey North Dakota, and it is further provided that the Mortgagee, attorneys or agents, may purchase the property hereby mortgaged at such sale

(Words used in this instrument in the masculine gender include the feminine and neuter, the singular number includes the plural and the plural the singular.)

Witness my hand and seal, this 13th day of January, 1923.

Sophia Mosher. (Seal.) —— ——. (Seal.)

Signed and delivered in presence of C. B. Neal, R. C. Jacobson.

There must be two witnesses.

Mortgagors Receipt for Copy

I hereby acnonwledge that at the time of the making and delivery of this mortgage the mortgagee delivered to me a [fol. 158] full, true and complete copy of the foregoing Mortgage without additional cost to me, and that I received said copy of Mortgage.

Sophia Mosher, Mortgagor.

STATE OF NORTH DAKOTA,
County of —— ss:

On this — day of —— in the year of 192-, before me personally appeared —— ——, known to me to be the person described in and who executed the within instrument, and who acknowledged to me that he executed the same freely and voluntarily.

—— ——, Notary Public in and for —— County, N. D.

Notary's commission expires —— —, ——.

—— ——, being first duly sworn on oath deposes and says, that he is the mortgagor described in the within mortgage, payable to —— —— mortgagee within named; — further state that — T — the owner of all the property described in the within mortgage, and that —— ha— not bargained, sold or mortgaged said property or any part thereof to anyone, and that each and every item described in the within mortgage is clear and free from any and all incumbrance.

—— ——, Mortgagor.

Subscribed and sworn to before me this — day of —— A. D. 192-.

—— ——, Notary Public —— .

My commission expires — —— ——.

STATE OF NORTH DAKOTA,
County of ——:

I hereby certify that I have examined the records of my office, and that from such records there are no liens of any kind against any of the within described property, except ———— — —

—— —— by —— ——.

Dated —— —, ——.

[fol. 159] (Endorsed on back thereof:) No. 133021. Chattel Mortgage. Sophia Mosher to Dazey State Bank. Dazey, North Dakota.

Office of the Register of Deeds

STATE OF NORTH DAKOTA,
County of Barnes, ss:

I hereby certify that the within instrument was filed in this office on the 29th day of Jan. A. D. 1923, at 1:23 o'clock P. M., and duly entered in Book —— of Chattel Mortgage Registry Index.

Dated —— —, 192-.

O. M. Roe. Register of Deeds, By —— ——, Deputy.
(Seal.)

I hereby certify that I have carefully examined the within instrument and compared the same with the original mortgage No. 133021 now on file in this office and that it is a true and correct copy of the same, and the whole thereof, and that the above is a true copy of the filing thereon.

(Signed) O. M. Roe, Register of Deeds, by ——
——, Deputy.

DEFENDANT'S EXHIBIT 2

135A Chattel Mortgage—North Dakota 1917 Form

Know all men by these presents, that I, Sophia Mosher, by occupation a farmer of Dazey, postoffice, County of Barnes, State of North Dakota, mortgagor, for the purpose of securing the payment of Sixteen Hundred Forty-six 49/100 Dollars, and interest at the rate of ten per cent, per annum, according to the conditions of one promissory note payable at office of mortgagee herein named, to-wit:

One note dated Jan. 13th, 1923 for $1,646 49/100 due Nov. 1st, 1923.

One note dated — 192- for $— due — 192-.

One note dated — 192- for $— due — 192-.

[fol. 160] also all advances, moneys, goods, credits, guaranties or overdrafts, (in a sum not to exceed $—) advanced to me or for me my said mortgagee, do hereby mortgage to J. E. Jacobson, at Dazey, Barnes Co. State of North Dakota, mortgagee, all that certain personal property situated on S. E. ¼ of Section 2 Township 143 Range 59,

in Barnes County, N. D., now in my possession, owned by me and free from all incumbrances, to-wit:

One McCormick 7 ft. cut Binder (right hand) and complete One end spring buggy with Shaft One side Spring buggy with pole One two seated surrey, 3 Bob Sleighs, One loft, McCormick rake One McCormick 5½ ft. cut binder complete, One John Deere sulky plow. Two Havanna 16 shoe grain drill complete, One John Deere triple gang plow complete, One Gopher feed grinder One Moline wagon 3¼ inch tire with 100 bus. grain tank complete One Moline wagon 3¼ inch tire with 70 bus. grain tank complete One 2½ H. P. P. & O. gasoline Engine One walking 6 shoe cultivator.

Also the following described livestock, which is all of the kind now owned by me, whether in excess of the number or note:

Number	Color	Kind of property	Age	Weight	Marks, name or brands	From whom bo't, value
....	....	.. ....	....	....	.....	.....

together with all increase of said livestock. Also my undivided two-thirds interest in all the crops of every kind, including grass, which have been or may hereafter be sown, grown, planted, cultivated or harvested during the year, A. D. 1923, — wit: on the S. W. ¼ Sec. 1; S. E. ¼ Sec. 2; N. E. ¼ of N. W. ¼ Sec. 12; N. E. ¼ of Section No. 11, Township No. 143, Range No. 59, in Barnes County North Dakota; together with any and all hail insurance placed on, carried, or received in case of loss, total or partial, on grain herein mortgaged.

Provided, that if the undersigned shall pay all of said indebtedness and interest, then this mortgage shall be void, and it is hereby agreed, that if default be made in the payment of said debt or either of said notes or any part thereof, or any attempt be made to remove or dispose of said property, or any part thereof, or at any time the said mortgagee, or assigns, shall deem the said debt unsafe or insecure, he is hereby authorized by himself, his attorneys or agents, to enter upon the premises where said property [fol. 161] may be, remove and sell the same, in the manner and with the notice prescribed by the laws of North Dakota, and out of the proceeds retain the amount then due and owing on said debt, with the expenses attending the

sale, including attorney fees prescribed by law; and should default be made in the payment of said promissory note or notes or either of them or any part thereof, the whole of said debt shall become immediately due and payable, and said Mortgagee, his attorneys, agents or assigns, may commence action for the recovery of the whole of said debt, or proceed to foreclose this mortgage as above provided in case of default upon maturity of the whole of the debt secured hereby, and the delivery of this mortgage to an attorney for the purpose of foreclosure shall be considered sufficient to make said fees due and payable, rendering to the undersigned the surplus after the whole of said debt shall have been paid, with charges aforesaid.

It is hereby stipulated, by and between the parties hereto, that in case of default as above provided, Mortgagee may enter upon the premises wherever the harvested crops of any kind, nature or description, covered by this mortgage may be found, remove and sell the same in any usual market therefor at the time, in the usual manner, at the market price thereof in such market and without the notice prescribed by Section 8125 and Section 8126 of the Compiled Laws of 1913; and out of the proceeds retain the usual and reasonable charges for such transportation and sale of such crops, in addition to the principal and interest of such debt.

In case of foreclosure of this mortgage, sale shall be held at Dazey, North Dakota, and it is further provided that the Mortgagee, attorneys or agent, may purchase the property hereby mortgaged at such sale.

(Words used in this instrument in the masculine gender include the feminine and neuter, the singular number includes the plural and the plural is the singular.)

Witness my hand and seal this 13th day of January, 1923.

Signed and delivered in the presence of

Sophia Mosher. (Seal.) C. B. Neal, R. C. Jacobson. These must be two witnesses.

[fol. 162] Mortgagor's Receipt for Copy

I hereby acknowledge that at the time of the making and delivery of this Mortgage the mortgagee delivered to me a full, true and complete copy of the foregoing Mortgage without additional cost to me, and that I received said copy of Mortgage.

Sophia Mosher, Mortgagor.

(Written on back thereof)

STATE OF NORTH DAKOTA,
County of ——, ss.

On this — day of —— in the year of 192—, before me personally appeared —— —— known to me to be the person described in and who executed the within instrument, and who acknowledged to me that he executed the same freely and voluntarily.

—— ——, Notary Public in and for —— County, N. D.

Notary's Commission expires —— —, ——.

—— —— being first duly sworn, on oath deposes and says, that he is the mortgagor described in the within mortgage, payable to —— —— mortgagee within named; — further state that —— —— the owner of all the prperty deschibed in the within mortgage, and that — ha— not bargained, sold or mortgaged said property or any part thereof to anyone, and that each and every item described in the within mortgage is clear and free from any and all incumbrance.

——— ———, Mortgagor.

Subscribed and sworn to before me this — day of —— A. D. 192 —.

—— ——, Notary Public, ——.

My commission expires —— —, ——.

STATE OF NORTH DAKOTA,
County of ——.

I hereby certify that I have examined the records of my office, and that from such records there are no liens of any kind against any of the within described property, except ——.

Dated —— —, ——.

—— ——. By —— ——.

[fol. 163] No. 133062

Chattel Mortgage

Sophia Mosher to J. E. Jacobson, Dazey, North Dakota

Office of the Register of Deeds

STATE OF NORTH DAKOTA,
County of Barnes, ss. (Seal.)

I hereby certify that the within instrument was filed in this office on the 2nd day of Feb. A. D. 1923 at 9:04 o'clock A. M., and duly entered in Book — of Chattel Mortgage Registry Index.

Dated —— —, 192—.

O. M. Roe, Register of Deeds. By N. J. Halvorson, Deputy.

I hereby certify that I have carefully examined the within instrument and compared the same with the original mortgage No. 133062 now on file in this office and that it is a true and correct copy of the same, and the whole thereof, and that the above is a true copy of the filing thereon.

(Signed) O. M. Roe, Register of Deeds. By —— ——, Deputy.

DEFENDANT'S EXHIBIT 3

135—A Chattel Mortgage—North Dakota 1917 Form

Know all men by these presents, That I, Sophia Mosher, by occupation a farmer of Dazey postoffice, County of Barnes, State of North Dakota, mortgagor, for the purpose of securing the payment of Fifteen Hundred 00/100 Dollars, and interest at the rate of ten per cent per annum, according to the conditions of one promissory note payable at office of mortgagee herein named, to-wit:

One note dated Jan. 13, 1923 for $1500 00/100 due Oct. 15, 1923.

One note dated —— —, 192—, for $—— due —— —, 192—.

[fol. 164] One note dated —— —, 192—, for $—— due —— —, 192—.

also all advances, money, goods, credits, guaranties or overdrafts, (in a sum not to exceed $——,) advanced to me or for me by said mortgagee, do hereby mortgage to Dazey State Bank, a corporation at Dazey Barnes Co., State of North Dakota, mortgagee, all that certain personal property situated on — of Section —, Township —, Range —, in — County, N. D., now in my possession, owned by me and free from all incumbrance, to-wit:

Also the following described livestock, which is all of the kind not owned by me, whether in excess of the number or not: Number: —; Color: —; Kind of Property: —; Age: —; Weight: —; Name: —; Marks or Brands: —; From Whom Bo't: —— ——; Value: —, together with all increase of said livestock. Also my undivided two-thirds interest in all the crops of every kind, including grass, which have been, or may hereafter be sown. grown, planted, cultivated or harvested during the year, A. D. 1923, to-wit: on the SW¼ Sec. one, SE¼ of Sec. two, NE¼ of Section No. 11, all in Township No. 143, Range No. 59, in Barnes County, North Dakota; together with any and all hail insurance placed on, carried or received in case of loss, total or partial, on grain herein mortgaged.

Provided, that if the undersigned shall pay all of said indebtedness and interest, then this mortgage shall be void, and it is hereby agreed that if default be made in the payment of said debt or either of said notes or any part thereof, or any attempt be made to remove or dispose of said property or any part thereof or at any time the said mortgagee or assigns, shall deem the said debt unsafe or insecure, he is hereby authorized by himself, his attorneys or agents, to enter upon the premises where said property may be, remove and sell the same, in the manner and with the notice prescribed by the laws of North Dakota, and out of the proceeds retain the amount then due and owing on said debt, with the expenses attending the sale, including attorney's fees prescribed by law; and should default be made in the payment of said promissory note or notes, or either of them or any part thereof, the whole of said debt shall become immediately due and payable, and said Mortgagee, his attorneys, agents or assigns may commence ac-

tion for the recovery of the whole of said debt, or proceed [fol. 165] to foreclose this mortgage as above provided in case of default upon maturity of the whole of the debt secured hereby, and the delivery of this mortgage to an attorney for the purpose of foreclosure shall be considered sufficient to make said fees due and payable, rendering to the undersigned the surplus after the whole of said debt shall have been paid, with charges aforesaid.

It is hereby stipulated, by and between the parties hereto, that in case of default as above provided, Mortgagee may enter upon the premises wherever the harvested crops of any kind, nature or description, covered by this mortgage may be found, remove and sell the same in any usual market therefor at the time, in the usual manner, at the market price thereof in such market and without the notice prescribed by Section 8125 and Section 8126 of the Compiled Laws of 1913; and out of the proceeds retain the usual and reasonable charges for such transportation and sale of such crops, in addition to the principal and interest of such debt.

In case of foreclosure of this mortgage, sale shall be held at Dazey, North Dakota, and it is further provided that the Mortgagee, attorneys or agents, may purchase the property hereby mortgaged at such sale.

(Words used in this instrument in the masculine gender include the feminine and neuter, the singular number includes the plural and the plural the singular.)

Witness my hand and seal, this 13th day of January, 1923.
Signed and delivered in presence of
Sophia Mosher. (Seal.) C. B. Neal. R. C. Jacobson, There must be two witnesses. (Seal.)

Mortgagor's Receipt for Copy

I hereby acknowledge that at the time of the making and delivering of this mortgage the mortgagee delivered to me a full and true and complete copy of the foregoing Mortgage without additional cost to me, and that I received said copy of mortgage.

Sophia Mosher, (Mortgagor).

STATE OF NORTH DAKOTA,
County of ——, ss:

On this — day of —— in the year of 192— before me personally appeared —— —— known to me to be the person [fol. 166] described in and who executed the within instrument, and who acknowledged to me that he executed the same freely and voluntarily.

—— ——, Notary Public in and for —— County, N. D. Notary's commission expires —— —, ——.

—— ——, being first duly sworn, on oath deposes and says, that he is the mortgagor described in the within mortgage, payable to —— —— mortgagee within named; — further state that —— —— the owner of all the property described in the within mortgage, and that — ha- not bargained, sold or mortgaged said property or any part thereof to anyone, and that each and every item described in the within mortgage is clear and free from any and all incumbrance.

—— ——, Mortgagor.

Subscribed and sworn to before me this — day of —— A. D 192—. —— ——, Notary Public. My commission expires —— — ——.

STATE OF NORTH DAKOTA,
County of ——, —:

I hereby certify that I have examined the records of my office, and that from such records there are no liens of any kind against any of the within described property, except ——.

Dated —— —, ——.

—— ——, By —— ——.

No. 132948. Chattel Mortgage. Sophia Mosher to Dazey State Bank, Dazey, North Dakota. Office of the Register of Deeds.

[fol. 167] STATE OF NORTH DAKOTA,
County of Barnes, ss:

I hereby certify that the within instrument was filed in this office on the 19th day of Jan. A. D. 1923 at 9:05 o'clock

A. M., and duly entered in Book —— of Chattel Mortgage Registry Index.

Dated —— —, 192-.

O. M. Roe, Register of Deeds, by —— ——, Deputy. (Seal.)

I hereby certify that I have carefully examined the within instrument and compared the same with the original mortgage No. 132948 now on file in this office and that it is a true and correct copy of the same, and the whole thereof, and that the above is a true copy of the filing thereon.

(Signed) O. M. Roe, Register of Deeds, by —— ——, Deputy.

DEFENDANT'S EXHIBIT 4

In District Court, First Judicial District

STATE OF NORTH DAKOTA,
County of Cass, ss:

I, R. F. Croal, Clerk of the District Court for Cass County, within the First Judicial District of the State of North Dakota, the same being a Court of Record, having a seal,

Do hereby certify, that I have compared the papers to which this certificate is attached, with the originals, to-wit; The findings of fact, conclusions of law order for judgment and judgment in the case entitled Dakota Life Insurance Company, a Corporation, Plaintiff, vs. Oscar Mosher et al., defendants, and the same are true and correct copies thereof as the originals now remain on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at the City of Fargo, in said Cass County, North Dakota, this 6th day of October, 1925.

(Signed) R. F. Croal, Clerk. (Seal of District Court, Cass County, North Dakota.)

[fol. 168] State of North Dakota,
County of Cass, ss:

In District Court First Judicial District

I, A. T. Cole, one of the Judges of the District Court of the First Judicial District, of the State of North Dakota, the same being a Court of Record having a seal.

Do hereby certify, that R. F. Croal, whose signature appears signed to the above certificate, was then and is now the duly elected, qualified and acting Clerk of said District Court, and that his signature thereto is genuine and that said attestation is in due form.

Dated October 6th, 1925.

(Signed) A. T. Cole, Judge.

State of North Dakota,
County of Cass, ss:

In District Court First Judicial District

I, R. F. Croal, Clerk of the District Court for Cass County, within the First Judicial District of the State of North Dakota, the same being a Court of Record having a seal,

Do hereby certify, that A. T. Cole, whose signature appears signed to the above certificate, was then and is now one of the duly elected, qualified and acting Judges of the District Court of the First Judicial District of the State of North Dakota, and that his signature thereto is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court at the City of Fargo, in said Cass County, North Dakota, this 6th day of October, 1925.

(Signed) R. F. Croal, Clerk. (Seal of District Court, Cass County, North Dakota, attached.)

State of North Dakota,
County of Cass:

In District Court First Judicial District

Dakota Life Insurance Company, a Corporation, Plaintiff,

vs.

Oscar Mosher, Dazey State Bank, a Corporation, L. E. Baird as Receiver of Dazey State Bank, N. Dak., J. E. [fol. 169] Jacobson, Midland National Bank of Minneapolis, Minnesota, Sophia Mosher as Administratrix of the Estate of Oscar Mosher, Deceased, Defendants.

Findings of Fact and Conclusions of Law

The above entitled action is brought to cancel an insurance policy issued by the said Plaintiff to the defendant Oscar Mosher, on the ground that the said policy was obtained by false representations contained in the application for the same; and to obtain relief as to the other defendants, of judgment, cancelling the said policy.

It appearing that the Summons and Complaint was personally served upon the said defendant Oscar Mosher, on the 23rd day of June, 1923, by the Sheriff of Barnes County, North Dakota, and that the said Defendant Oscar Mosher did not appear in the said action, and that no answer or demurrer, or copy of either, has been received by or served upon the said plaintiff, or any of its attorneys, by the said defendant Oscar Mosher, and that affidavit of such default was made August 1st, 1923, and filed in the said Court; and that Oscar Mosher died on the 10th day of September, 1923; and that the defendant Sophia Mosher, was appointed and qualified, as Administratrix of the Estate of Oscar Mosher, deceased, on the 11th day of December, 1923, and that said Administratrix was made a party defendant to the said action by Order of Court, substituting the said administratrix for the said deceased defendant; and that the Summons and Complaint, showing such substitution, was personally served on the said substituted defendant, on the 11th day of December, 1923, and service thereof was

admitted by the said substituted defendant, on the same day that the service was made; and that the said defendant Sophia Mosher, as Administratrix of the Estate of Oscar Mosher, deceased, has failed to appear in the said action, and that no Answer or demurrer, or copy of either therein, has been received by, or served upon the said Plaintiff, or any of its attorneys, Lawrence, Murphy & Nilles of Fargo, North Dakota; and that said defendant is wholly in default in the said action; and that affidavit of such default has been made and filed in the said Court; and the said action having been called for trial on the issues, and against said defendants, Oscar Mosher and Sophia Mosher as administratrix of the estate of Oscar Mosher, deceased, before the said Court at Fargo, North Dakota; and the Court having heard and considered the testimony of plaintiff, submitted by depositions of John B. Hanten, Sophia Mosher, Edward Ladbury and Dr. J. L. Livingston; and exhibits attached to the deposition of John B. [fol. 170] Hanten, numbered Exhibits 1 to 12 inclusive; on motion of Lawrence, Murphy & Nilles, attorneys for plaintiff, of Fargo, North Dakota, the Court now makes the following Findings of Fact:

I

That the allegations made in the complaint are true, and that the said plaintiff's testimony substantiates and establishes the facts and allegations contained in the complaint.

II

That plaintiff is a foreign corporation, organized, created and existing under and by virtue of the Laws of the State of South Dakota, and is authorized to transact business in the State of North Dakota, and is engaged in the business of writing life insurance.

III

That said plaintiff issued its policy to Oscar Mosher, on Ordinary Life Term payments, numbered 18260, dated June 10, 1920, for the amount of $10,000.00, on application dated

May 14, 1920, and on the preliminary term plan, to expire November 28, 1920.

IV

That the application for said insurance policy was signed by Oscar Mosher, and contained the following terms, conditions and provisions, to-wit:

"I hereby agree that this application and the policy hereby applied for, taken together, shall constitute the entire contract between the parties hereto, and I hereby declare that all the answers and statements made above, and those that shall be made to the Medical Examiner are true; and that this contract shall not take effect until the first premium has been paid during my good health."

and

"This policy is issued in consideration of the answers made in the application herefor, and the statements made therein, all of which are made a part hereof, and copied thereon."

V

That on or about, and after, the 10th day of June, 1920, the said policy was sent to Plaintiff's local agent, J. E. [fol. 171] Jacobson, of Dazey, North Dakota, for delivery to the said Insured, on the payment of the premium to be paid, and the Short Term, amounting to the sum of $108.50.

VI

That Oscar Mosher made no payment of any premium on the said policy and the said policy has been, since its transmission, in the possession of the plaintiff's local agent, J. E. Jacobson, and until its assignment was made to the other defendants in this Action, in the order in which they are named, in the title of the said Action; and the said Oscar Mosher did not know by whom the premium payments were made, on the said policy.

VII

That Oscar Mosher, before making the said application, and at the time of the issue of the policy, and ever since

thereafter, was afflicted, in an advanced state, with tuberculosis of the lungs, and was not in good health, and knew his condition of health was not good, at the time the said application was made, and transmitted, for the said insurance policy; and the policy did not take effect at the time the first premium was paid, and said Oscar Mosher not having been, and not being in good health at the time the application was made.

VII½

That defendant Oscar Mosher died intestate on the 10th day of September, 1923, and that defendant Sophia Mosher is the fully appointed, qualified and acting administratrix of the estate of Oscar Mosher, deceased. That on the 14th day of May, 1920, said Oscar Mosher was suffering from the disease of consumption from which malady he later died as aforesaid, and that at the time of signing and delivering said application for insurance — the plaintiff, he was afflicted with such disease and that he was not in good health at the time he executed and delivered such application for insurance nor at the time of the delivery of such policy, nor at any time since a date prior to May 14th, 1920, and that plaintiff had no knowledge thereof until long after the 10th day of June, 1920, and that said Oscar Mosher, deceased, knew that he was not in good health at the time he executed said application for insurance and knew at all times thereafter until his death that he was not in good health but was afflicted with the disease of consumption, and that such policy of insurance never took effect or became operative as an obligation against this [fol. 172] plaintiff, and that the same was cancelled and nullified by mutual agreement of the parties thereto.

VIII

That said plaintiff had no knowledge nor information until or about the 19th day of May, 1923, of the real condition of the health of the said Oscar Mosher, before the time, and at the time, and after the time that the said application was made for the said policy.

IX

That the following premium payments were made before the 19th day of May, 1923:

Short Term Premium	$108 50
First annual premium, November 28, 1920	394 20
Partial payment, December 30, 1921	134 81
Extended payment of premium Nov. 24, 1922	275 94
Partial premium payment December 2, 1922	134 82

Extension of balance to November 28, 1923—making a total of payments and interest thereon to May 21, 1923 of the sum of $1,102.20.

X

That on or about the 1st day of June, 1923, the said plaintiff offered to the said defendant, Oscar Mosher, to rescind and cancel the said policy, and to repay to him the amount of the premium payments made, with interest thereon at 6% to May 23, 1923; and the said Oscar Mosher declared that no premium payments were made by him on the policy, and refused to accept the same; and the said Oscar Mosher consented to the cancelling of the policy, on condition that the amount of all premiums paid on the said policy be offered and returned to the parties making the payments on the said policy.

Upon the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

I

That policy issued by the Dakota Life Insurance Company of Watertown, South Dakota, to Oscar Mosher, be declared rescinded and cancelled, and void from the beginning.

II

That said plaintiff, Dakota Life Insurance Company pay into Court the amount of One Thousand and Two and [fol. 173] 20/100 Dollars ($1,102.20) and interest thereon from and after the 21st day of May, 1923, at the rate of 6% to date of payment.

III

That said Plaintiff have judgment in its favor, and against the said Oscar Mosher, and Sophia Mosher, as Administratrix of the Estate of Oscar Mosher, deceased, adjudging and decreeing policy Number 18260 for the amount of $10,000.00 dated June 10, 1920, issued by Dakota Life Insurance Company, to Oscar Mosher, cancelled, and void from the beginning.

Done by the Court at Fargo, North Dakota, this 8th day of April, 1924.

(Signed) A. T. Cole, Judge of said Court.

State of North Dakota,
County of Cass:

In District Court First Judicial District

Dakota Life Insurance Company, a Corporation, Plaintiff,

vs.

Oscar Mosher, Dazey State Bank, a Corporation, L. E. Baird, as Receiver of Dazey State Bank, N. Dak., J. E. Jacobson, Midland National Bank of Minneapolis, Minnesota, Sophia Mosher, as Administratrix of the Estate of Oscar Mosher, deceased, Defendant

Judgment

The above entitled action is brought to cancel an insurance policy issued by the plaintiff to the defendant Oscar Mosher, and the summons and complaint were personally served upon the defendant Mosher on the 23rd day of June, 1923, and no answer or demurrer or copy of either has been received by or served upon the plaintiff, by the defendant Oscar Mosher, and that he is wholly in default in such action, and that after becoming in default, the said Oscar Mosher died on the 10th day of September, 1923, and the defendant Sophia Mosher was appointed and qualified as Administratrix of the estate of Oscar Mosher, deceased, on the 11th day of December, 1923, and was made a party to

this action by order of this Court, being substituted for the deceased defendant, and that summons and complaint showing such substitution were personally served on the substi-
[fol. 174] tuted defendant on the 11th day of December, 1923, and that said substituted defendant, Sophia Mosher, as the duly appointed, qualified and acting administratrix of the estate of Oscar Mosher, deceased, has failed to appear in such action, and that no answer or demurrer, or copy of either, has been received or served upon the plaintiff or any of its attorneys, and that the defendant Oscar Mosher and the defendant Sophia Mosher, as administratrix of the estate of Oscar Mosher, deceased, are wholly in default in such action, and said action having been called for trial on the issues as against the defendants *Oscar* Mosher, as Administratrix of the Estate of Oscar Mosher, deceased, before said Court at its Chambers in the City of Fargo, Cass County, North Dakota, and the Court having heard and considered the testimony of plaintiff, submitted by the depositions of John B. Hanten, Sophia Mosher, Edward Ladbury and Dr. J. L. Livingston, together with the exhibits and other evidence offered in connection therewith,

It Is Now On Motion of Lawrence, Murphy & Nilles, Attorneys for Plaintiff, pursuant to the order for Judgment heretofore executed and filed by this Court,

Ordered, Adjudged and Decreed, That the policy of insurance issued by the Dakota Life Insurance Company at Watertown, South Dakota, mentioned and described in the complaint, to Oscar Mosher as insured, be and the same is hereby rescinded and cancelled and determined and adjudged to be void from the beginning.

It Is Further Ordered, Adjudged and Decreed, That the plaintiff Dakota Life Insurance Company of Watertown, South Dakota, pay into court the amount of $1,102.20 and interest thereon from and after the 21st day of May, 1923 at the rate of 6% per annum to day of payment, for further disposition by this Court as it may direct by its judgment and decree herein as to such fund.

It Is Further Ordered, Adjudged and Decreed, That plaintiff have judgment in its favor and against said Oscar Mosher and Sophia Mosher, as administratrix of the estate of Oscar Mosher deceased, adjudging and decreeing that policy No. 18360 heretofore issued by the Dakota Life In-

surance Company of Watertown, South Dakota, upon the life of Oscar Mosher, as insured, in the amount of $10,000.00 dated June 10th, 1920, be and the same is hereby cancelled, annulled and adjudged to be void and of no effect from the beginning.

[fol. 175] Witness the Hon. A. T. Cole, my hand and the seal of this Court, this 12th day of May, A. D. 1924.

(Signed) R. F. Croal, Clerk. A. M. Hurley, Deputy.

(Seal.)

DEFENDANT'S EXHIBIT 5

(Note)

$1,500.00 Dazey, North Dakota, Jan. 13th, 1923.

Oct. 15th, after date, for value received, I promise to pay to the order of Dazey State Bank at its banking house in Dazey, North Dakota, Fifteen Hundred (00/100) Dollars, with interest at the rate of ten per cent per annum from date payable annually. Interest and principal not paid when due shall draw interest at the rate of 10 per cent per annum. The drawers and endorsers of this note severally waive presentment and notice of protect and guarantee its payment at any time after maturity.

(Signed) Oscar Mosher. (Signed) Sophia Mosher.

P. O. ——.

No. 15704 Due ——

(Written across face of note:) Collateral to note $1,093.75, 9-1-23 and $200.00. Demand.

(Endorsements on back of note:) Dazey State Bank by J. E. Jacobson, Pres. Pay to the order of Ed Ladburg without recourse. First National Bank, Fargo, North Dakota, by E. V. Bassett.

(Revenue stamps, 30 cents, attached and cancelled by stamp "Dazey State Bank, Dazey, North Dakota").

[fol. 176] DEFENDANT'S EXHIBIT 6

J. W. Jacobson, President, Geo. J. Jacobson, Vice Prest.
C. O. Jacobson, Asst. Cashier.

Dazey State Bank

Capital $15,000.00

Earned Surplus and undivided profits $20,000.00

Dazey, N. Dak.

January 20th, 1923.

Mr. Oscar Mosher, Dazey, North Dakota.

DEAR SIR: I am sending you a note for $682.98 which kindly sign. Also please have your wife sign it with you. This was the difference in settling with the Dazey State Bank on the former notes of yours and this will make the correct amount in order to balance the books of the Dazey State Bank. Will you kindly sign this note so that we can get it back by return mail.

Yours truly, (signed) J. E. Jacobson, R. E. J.

(Written on side:) 682 98/100 Jan. 13-23.

DEFENDANT'S EXHIBIT 7

The Midland National Bank

Minneapolis, Minn.

March 5, 1923.

Mr. Oscar Mosher, Dazey, N. D.

DEAR SIR: Re: Note signed by yourself and Sophia Mosher.

We are advised that the Dazey State Bank, Dazey North Dakota, has closed and this will inform you that we are the holder of your note of $2,010.86 dated 1-13-23 and due 10-15-23, as security to the indebtedness of said bank.

[fol. 177] It will be our policy to realize on our collateral at the earliest possible date and we feel that you are entitled to this information in order that prompt steps may be taken to liquidate your indebtedness as above described.

You are notified also, in order that you may protect your interests, that in connection with this particular indebtedness you are legally bound to recognize no one in the payment thereof except the Midland National Bank or its agent and that this indebtedness is owing us now and not the Dazey State Bank.

Please get in touch with our agent, Mr. C. B. Neal, who is now at Dazey, at once and let him know just what your intentions are.

Yours very truly, (Signed) J. H. Sharpe, Assistant Cashier.

JHS-m.

(Prayer of Defendant for approval of Bill of Exceptions.)

Defendant prays that its bill of exceptions, may be allowed, settled and signed.

John B. Hanten, Watertown, S. D. and O'Malley & O'Malley, Counsel for Defendant, 900-905 Guardian Life Bldg., St. Paul, Minnesota.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

During term motion for a new trial by the defendant was filed, to-wit: March 16th, 1926, and set down for hearing at a special term of this Court for the 27th day of March, 1926, at which time it was continued to the 10th day of April, 1926, at which time it was heard and on the 12th day of April, 1926, this Court's order was filed, denying said motion. The Court's control of the bill of exceptions having been preserved by reason of the pendency of said motion for a new trial, Now,

[fol. 178] It is hereby ordered, that this bill of exceptions is settled and allowed this 1st day of May, 1926.

John B. Sanborn, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR—Filed May 3, 1926

To the Honorable John B. Sanborn, Judge of the District Court aforesaid:

Now comes the Dakota Life Insurance Company, a corporation, by attorneys, and respectfully shows that on the 19th day of October, A. D. 1925, each of the parties to the above entitled cause moved for a directed verdict at the close of all of the testimony, and thereupon the Court took the cause under advisement and on the 30th day of December, 1925, made a general finding in favor of plaintiff and ordered judgment thereon in its favor and against your petitioner and upon said finding and order a final judgment was entered on the 30th day of December, 1925 against your petitioner. That thereafter and during the October, 1925, Term of this Court, and on March 16th, 1926, motion for new trial was filed herein and was on the calendar of this Court for hearing at special term of this Court on the 27th day of March, 1926, at which time said hearing was by consent of parties continued to the 10th day of April, 1926, at which time said motion was finally submitted and heard and entertained by the Court. That thereafter and on the 12th day of April, 1926, this Court entered and filed its order overruling and denying your petitioner's said motion for a new trial.

Your petitioner feeling itself aggrieved by the said finding and judgment, entered herein as aforesaid, herewith petitions the Court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States, for the Eighth Circuit, under the laws of the United States in such case made and provided.

Wherefore, Your petitioner prays that a writ of error be issued; that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by plaintiff in error, conditioned as the [fol. 179] law directs, and upon giving such bond as may be required, that all further proceedings may be suspended

until the determination of said writ of error by the Circuit Court of Appeals.

John B. Hanten, Watertown, South Dakota, and O'Malley & O'Malley, 900-905 Guardian Life Bldg., St. Paul, Minnesota. Attorneys for Plaintiff in Error.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed May 3, 1926

Now comes the defendant Dakota Life Insurance Company, a corporation, and plaintiff in error, in the above numbered and entitled cause, and in connection with its petition for writ of error in this cause assigns the following errors which plaintiff in error avers at the trial thereof and upon which it relies to reverse the judgment entered herein as appears of record.

I

That the Court erred in making its order filed herein on the 16th day of October, 1924, granting plaintiff's motion to strike, and in striking, out all of paragraphs IV to VI, inclusive; IX to XI, inclusive; XIII to XX, inclusive; XXV to XXVIII, inclusive; XLII to XLV, inclusive; and the words "in furtherance of said conspiracy" in paragraphs XII to XXIX; and the words "when and while he, said Mosher, was in good health, upon payment of the first premium by him" in paragraph XXIV, of defendant's answer to plaintiff's amended complaint filed herein, on the alleged ground that said parts of said pleading consisted wholly of irrelevant and redundant matter; and in determining and adjudging that the allegations so stricken constituted no defense to the action.

II

That the Court erred in making its order filed herein on the 16th day of October, 1924, granting plaintiff's motion to strike, and in striking out all of paragraphs VIII; XXIII; XXXII; XXXIV; XXXV; XXXVII to XLI, inclusive; and

all that part of paragraph XXXI following after the words "marked Exhibit B" in the fifth line of said paragraph; and that part of paragraph XXXVI consisting of the words "but that it did so without knowledge of the facts hereinbefore alleged. That if it had known at the time of the existence of the state of things hereinbefore set forth it [fol. 180] would have refused to approve any of said assignments," of defendant's answer to plaintiff's amended complaint filed herein, on the alleged ground that all of said parts consist wholly of irrelevant and redundant matter and in determining and adjudging that the allegations contained in said paragraphs and parts of paragraphs so stricken did not constitute any defense to plaintiff's cause of action.

III

That the court erred in sustaining the objection by plaintiff to the admission in evidence of defendant's Exhibit 4, the ground of said objection being that the exhibit is immaterial and irrelevant. Defendant's Exhibit 4 being a duly authenticated copy of the Findings of Fact and Conclusions of Law and judgment entered thereon in an action brought in the District Court in the County of Cass and in the First Judicial District of the State of North Dakota, in which the Dakota Life Insurance Company, a corporation, is named as plaintiff and Oscar Mosher, Dazey State Bank, a Corporation, L. E. Baird as Receiver of Dazey State Bank, N. Dak., J. E. Jacobson, Midland National Bank of Minneapolis, Minnesota, Sophia Mosher as Administratrix of the Estate of Oscar Mosher, Deceased, are defendants, wherein and whereby the Court determined that the policy of insurance involved in this action was procured by fraudulent representations of Oscar Mosher and wherein and whereby it was determined that the sum of $1,102.20 had been paid on account of the premiums of said policy; and wherein and whereby it was determined that an agreement of rescission was made between Oscar Mosher, the insured, and the Dakota Life Insurance Company, whereby said Mosher consented to the cancelling of the policy on the condition that all premiums paid on account of the policy be offered and returned to the parties who made the payments thereon; and wherein and whereby it was determined in said action that plaintiff have judgment in its favor

against Oscar Mosher and Sophia Mosher as administratrix of the estate of Oscar Mosher, deceased, that policy No. 18360 for the amount of $10,000.00 dated June 10th, 1920, issued by Dakota Life Insurance Company to Oscar Mosher, be cancelled annulled and adjudged to be void and of no effect from the beginning; said judgment having been entered at Fargo in said County, District and State on the 8th day of April, 1924.

IV

That the Court erred in sustaining plaintiff's objection to the offer of defendant to prove by the witness Sophia Mosher the following facts in substance:

[fol. 181] That on the 13th day of January, 1923, a number of notes were presented to the witness and her husband Oscar Mosher (the insured) to sign, which they in fact did sign; that at the time the notes were signed there was only one statement made and that was that they (Rudolph Jacobson, and C. B. Neal, representative of the plaintiff, Midland National Bank) where there to secure the renewal of the notes, the amount that was due to the Dazey State Bank and J. E. Jacobson at that time; that the notes which were signed at this time exclusive of the two $5,000.00 notes represented the full amount of the indebtedness that was owing from Oscar Mosher and his wife Sophia Mosher to the Dazey State Bank and J. E. Jacobson; that there was no statement made of any $500.00 notes or that two $5,000.00 notes were to be signed; that there was nothing stated as to the amount of $10,000.00 being turned over or being paid, and that there was no statement or claim made that any such amount was due from Oscar Mosher or from Sophia Mosher; and that the two $5,000.00 notes (plaintiff's exhibits D and E) were not called to their attention; that there had been no prior debt of Oscar Mosher or Sophia Mosher for which these two $5,000.00 notes were made; that the total indebtedness of Oscar Mosher and Sophia Mosher to the Dazey State Bank and J. E. Jacobson at this time was about $5,500.00; that the aggregate of said notes signed and executed by Oscar Mosher and Sopria Mosher at said time was $5,157.35 and that on the same date the said Moshers executed chattel mortgages to secure the payment of all of these notes; that subsequent to January

13th, 1923, the said Moshers executed another note in the sum of $682.98; that there was no consideration whatsoever paid either to Oscar Mosher or Sophia Mosher for the execution of the two notes of $5,000.00 each (the same being plaintiff's Exhibits D and E); that witness paid one $1,500.00 note.

That the Court erred in sustaining the objection by plaintiff to defendant's offer to prove in substance by the witness J. J. Bell, actuary of the Dakota Life Insurance Company, that he approved of the assignment of the policy on behalf of the Company on the 2nd day of March, 1923, at Watertown, South Dakota, and it was then transmitted by mail to the Midland National Bank; that at that time he was not aware of any defenses that existed to the policy of $10,000.00 described in the said assignment, and he was not aware that the two promissory notes aggregating $10,000.00 described in the said assignment, (and which the said assignment purported to be given to secure), were [fol. 182] made without consideration moving to the insured; and that he was not aware that the two notes were executed without knowledge of the signers and that the signing of the same had been procured by a trick or deception; that at the time he approved the assignment he believed that consideration had passed to the makers of the notes; and that if he had been informed as to the true state of facts he would not have approved said assignment.

VI

That the court erred in sustaining the plaintiff's objection to defendant's offer to prove the following facts by the witness Maxwell Ladbury:

That he had a conversation with C. B. Neal, the representative of the plaintiff bank, which took place at the Hotel at Dazey, North Dakota, during the fall of 1923, in which C. B. Neal stated that the papers were all prepared and taken out to the farm, and that they went there to get them signed; and that the papers were signed, and they left; that before they went out there he had the opinion that the two $5,000.00 notes were of no account and doubted that they would be signed; that after he got there, the notes were signed, and they were taken up and brought to Dazey, North Dakota.

Wherefore, Plaintiff in error prays that the judgment of said Court be reversed.

John B. Hanten, Watertown, South Dakota, and O'Malley & O'Malley 900-905 Guardian Life Bldg., St. Paul, Minnesota, Attorneys for Plaintiff in Error.

(Endorsed:) Writ of error granted this the 3rd day of May, A. D. 1926.

Supersedeas bond fixed at $12,000.00.

John B. Sanborn, District Judge.

[File endorsement omitted.]

[fol. 183] In United States District Court

Writ of Error and Clerk's Return

United States of America, ss:

The President of the United States of America to the Honorable Judges of the District Court of the United States, for the District of Minnesota, Fourth Division, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the October Term, 1925, thereof, between The Midland National Bank of Minneapolis, a corporation, Plaintiff and Dakota Life Insurance Company, a corporation, Defendant manifest error hath happened, to the great damage of said defendants as by its complaint appears,

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid said at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court

of Appeals, for the Eighth Circuit, on or before the 2nd day of July, 1926, to the end that the record and proceedings aforesaid, being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 3rd day of May, A. D. 1926.

Issued at office in Minneapolis, Minnesota, with the seal of the District Court of the United States, for the District of Minnesota, Fourth Division.

Joel M. Dickey, Clerk of the District Court of the United States for the District of Minnesota, by Thomas H. Howard, Deputy. (U. S. Dist. Court Seal, Fourth Division, Dist. of Minnesota.)

Allowed by John B. Sanborn, Judge.

[fol. 184] UNITED STATES OF AMERICA,
District of Minnesota, Fourth Division, ss:

In obedience to the command of the above writ, I herewith transmit to the United States Circuit Court of Appeals, for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within-entitled cause, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the Seal of the District Court of the United States, for the District of Minnesota, Fourth Division.

Joel M. Dickey, Clerk of the District Court of the United States, for the District of Minnesota, by Thomas H. Howard, Deputy. (U. S. Dist. Court Seal, Fourth Division, Dist. of Minnesota.)

Citation, in usual form, showing service on Ueland & Ueland, filed May 3, 1926, omitted in printing.

[fols. 185-187] Bond on writ of error for $12,000, approved and filed May 5, 1926, omitted in printing.

[fol. 188] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed May 7, 1926

To Joel M. Dickey, Clerk of said Court:

In the above entitled cause please make and forward to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, Missouri, as and for a transcript of the record on the writ of error from said Circuit Court of Appeals, copies of the following papers:

1. The return on removal of cause from the District Court of the State of Minnesota, County of Hennepin, Fourth Judicial District.
2. Amended answer to original complaint.
3. Amended Complaint.
4. Answer to amended complaint.
5. Plaintiff's notice of motion to strike out various portions of defendant's answer to plaintiff's amended complaint on the ground that the same were redundant and irrelevant.
6. Order of Court filed October 16th, 1924, together with the Judge's opinion attached thereto, granting plaintiff's said motion to strike.
7. Defendant's notice of motion for leave to amend its Answer to Amended Complaint.
8. Order of Court granting defendant's motion for leave to amend its answer to amended complaint, together with the Court's opinion attached thereto.
9. Amended answer to amended complaint.
10. Reply to amended answer to amended complaint.
11. Empanelling jury.
12. Findings and decision by the Court together with its opinion attached thereto.
13. The Judgment.
14. Order staying execution forty-two days after the 24th of March, 1926, which order is dated March 22nd, 1926.
15. Notice of motion by defendant for a new trial.
16. Order overruling and denying defendant's motion for a new trial.

[fols. 189-190] 17. Notice of filing and presentation for allowance of bill of exceptions.

18. Bill of exceptions duly taken at the trial.
19. Petition for writ of error.

20. Assignments of error.
21. Bond and approval.
22. Allowance of writ of error.
23. The writ of error.
24. Citation in error.
25. Clerk's certificate.

The defendant in said cause files this its notice of election to take and file said transcript in said Circuit Court of Appeals, and requests that the same be printed under the supervision of the Clerk of said Circuit Court of Appeals under its rules.

John B. Hanten, Watertown, S. D. O'Malley & O'Malley, Attorneys for Defendant, 900-905 Guardian Life Bldg., St. Paul, Minnesota.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 191] In United States Circuit Court of Appeals, Eighth Circuit

No. 7505

Dakota Life Insurance Company, a Corporation, Plaintiff in Error,

vs.

Midland National Bank of Minneapolis, a Corporation, Defendant in Error

Order to Correct Transcript of Record

On the petition of the Dakota Life Insurance Company, the plaintiff in error, supported by the stipulation between plaintiff and defendant in error and the affidavit of Thomas H. Howard, Deputy Clerk of the United States District Court for the District of Minnesota, Fourth Division, and on motion of Messrs. O'Malley & O'Malley, attorneys for plaintiff in error,

It is hereby ordered, That the Clerk of the United States District Court for the District of Minnesota, Fourth Di-

vision, on the service on him of a copy of this order, forthwith forward to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, at St. Louis, Missouri, the original answer to the amended complaint in this action;

That the transcript of record herein be corrected and amended by striking therefrom folios 43, 44, 45, 46 and 47 thereof; and that said original answer to said amended complaint be accepted in lieu thereof as if the same had been printed instead of the folios so stricken, and that the transcript of record now on file herein, with said stricken portions omitted, together with said original answer to said amended complaint shall constitute the complete transcript of record herein.

Dated Noember 24, 1926.

[fol. 192] Appearances of counsel omitted in printing.

[fol. 193] Minute entry of argument and submission January 6, 1927, omitted in printing.

[fol. 194] In United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1926

No. 7505

Dakota Life Insurance Company, Plaintiff in Error,

vs.

Midland National Bank of Minneapolis, Defendant in Error

In Error to the District Court of the United States for the District of Minnesota

Mr. John B. Hanten (Messrs. O'Malley and O'Malley were with him on the brief), for plaintiff in error.

Mr. Sigurd Ueland (Mr. A. Ueland was with him on the brief), for defendant in error.

Before Lewis and Kenyon, Circuit Judges, and Trieber, District Judge.

OPINION—Filed April 12, 1927

LEWIS, Circuit Judge, delivered the opinion of the court.

The defendant in error, as plaintiff below and herein called plaintiff, recovered judgment against the Insurance Company on a $10,000 life policy, which it had issued to Oscar Mosher and by which it agreed to pay that sum to Mosher's executors, administrators and assigns on proof of his death.

The questions that are reviewable on this writ relate to the exclusion of offered proof in the light of the pleadings; and the errors assigned to the Court's ruling in excluding the offers must be considered on the assumption that plaintiff in error could have proven the facts embodied in the offer. On that basis we will first state the case as we find it in the record, not carefully separating the established facts from those which were excluded over objection. [fol. 195] The plaintiff sued as assignee of Mosher and attached to its complaint copies of the policy and assignment. The policy bears date May 14, 1920. Its assignment to plaintiff by Mosher was made February 26, 1923, and it is recited therein: "This assignment is given to secure the payment to the said party of the second part (Midland National Bank of Minneapolis) of the sum of Ten Thousand Dollars, according to the tenor and conditions of two promissory notes." There is no further description of the two notes. The Insurance Company approved in writing the assignment on March 2, 1923, and mailed it and the policy to plaintiff and the plaintiff received them at or about the same time it received two $5,000 demand notes (from whom, is not stated) bearing dates January 13, 1923, signed by Mosher and his wife and payable to J. E. Jacobson at the Dazey State Bank, Dazey, North Dakota, and both endorsed by Jacobson, presentment for payment being waived by the makers and endorser. Jacobson was indebted to the plaintiff Bank at that time in a sum in excess of $34,000. He was also principal owner and manager of

the Dazey State Bank which was then indebted to the plaintiff Bank in a sum in excess of $46,000. The Dazey State Bank closed its doors and failed on February 26, 1923, the day Mosher assigned the policy to plaintiff. Plaintiff claims it received the two described $5,000 notes as collateral on Jacobson's prior indebtedness to it and the policy as subcollateral on the two notes. Jacobson also seems to have been insolvent when the Dazey State Bank failed. He appears to have been the local agent at Dazey of the Insurance Company when the policy was issued. That company offered to show that the policy was applied for and issued at the instigation of Jacobson; that he retained possession of it for The Dazey State Bank; that Mosher assigned it to that Bank when it was issued and that Bank paid the first and all other premiums; that Mosher was a farmer living on a rented farm near Dazey, that all he had,—stock, farm implements and crops,—was mortgaged to that Bank to secure his indebtedness to it, which, the answer alleged, amounted to $5,686.08 at the time the policy issued; that at that time and for some time theretofore Mosher had tubercular consumption in an advanced state and continued in that condition until his death which occurred on September 10, 1923; that the signatures of Mosher and wife were obtained to the two $5,000 notes by Jacobson in the presence of plaintiff's agent by a trick and deception and there was no consideration to Mosher or his wife therefor; that when Mosher assigned the policy to plaintiff Bank, which was without any consideration to him, he was led to believe and [fol. 196] thought it was to secure his indebtedness then held by the plaintiff Bank assigned to it by The Dazey State Bank; that Mosher never had or kept the policy under his control, that it was taken out by and solely for the benefit of his creditor, The Dazey State Bank; and that the Insurance Company was wholly ignorant of the foregoing facts until shortly before Mosher's death, but after the policy was assigned to plaintiff; that on discovery of the foregoing facts it at once took steps to cancel the policy and for that purpose it tendered to Mosher all the premiums that had been paid which were refused by him on the ground that none of them had been paid by him and thereupon it brought a suit against Mosher in the state court to cancel the policy because of the facts stated, had summons in that

suit served on him and after his death and after his wife as his administratrix had been substituted a party in his stead, decree was entered in that suit canceling the policy as void from the beginning; that the Dazey State Bank and Jacobson were parties defendant in that suit, that it tried to make plaintiff Bank a party defendant also, but it was without the court's jurisdiction and succeeded in obtaining an order quashing the service of summons on it. Some of the facts stated were embodied in the state court decree which was rejected as proof and some may be but correlates of other offers.

Under this statement what were the rights of plaintiff Bank in the policy?

1. It was neither party nor privy of any party to the suit in the state court. It took an assignment of the policy before that suit was brought; hence it was not bound by the decree in that suit. No reason is shown why the general rule on this subject does not apply.

2. The fact, if it be a fact, that there was no consideration to the makers of the two $5,000 notes, is not a cause for complaint by the Insurance Company. Likewise as to the assignment of the policy by Mosher. And though it may be true that Mosher's signatures to the notes were obtained by a trick and deception, still they were valid obligations of Jacobson on his endorsements. Even Mosher's estate has no interest in the policy to protect. The state court decree bars it of any right it may have had. That court found that the policy was cancelled by mutual agreement of Mosher and the Insurance Company. As to The Dazey State Bank and Jacobson the decree does not show whether the court acquired jurisdiction as to them. The issue here is between [fol. 197] the Insurance Company and Mosher's assignee. That assignee took the policy as security on a valid preexisting debt with the approval of the insurer and the written consent of all prior assignees. If the policy was valid we do not think the insurer can escape liability by setting up even a good defense on a side issue in which it has no interest.

3. Mosher's application for the policy, bearing the same date as that of the policy (May 14, 1920), and made a part of the contract, stated that the policy "shall not take effect

until the first premium has been paid during my good health," and it is argued that Mosher's physical condition of bad health, hereinbefore stated, rendered the policy void from the beginning. His condition, if truly stated, was a fraud on the insurer in procuring the policy. But it was a North Dakota contract, and a statute of that state provided "that the policy shall constitute the entire contract between the parties and shall be incontestable after two years from its date." This restriction on the rights of the insurer to contest the validity of the policy for fraud in its procurement must be read into the policy for the purpose of fixing the rights and obligations of insurer and insured. It is a limitation on the insurer's right to discover and set up fraud in procuring the policy and if that is not done within the time limited the right is thereafter barred. That is the sole purpose of the statute. Mutual Life Ins. Co. v. Hurni Co., 263 U. S. 167, S. C. 280 Fed. 18; Great Southern Life Ins. Co. v. Russ, 14 F. (2d) 27.

4. The remaining proposition that requires consideration is the extent of insurer's liability on the proof and the tendered and rejected proof. The Dazey State Bank had an insurable interest in the insured's life, because it was his creditor at the time the policy was taken out. But for that relation it would have been a wagering contract and void in toto at its inception, because against public policy. Crotty v. Union Mutual Ins. Co., 144 U. S. 621; Washington Central Bank v. Hume, 128 U. S. 195; N. Y. Life Ins. Co. v. Armstrong, 117 U. S. 591; Warnock v. Davis, 104 U. S. 775; Conn. Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457; Gordon v. Ware Nat'l Bank, 132 Fed. 444. The insurable interest of The Dazey State Bank was limited to an amount reasonably adequate to cover Mosher's indebtedness to it and premiums which it would have to pay, and interest. The premiums with interest (all paid by that Bank according to defendant's offer of proof) were deposited by the insurer [fol. 198] in the state court, as shown by the decree in the case brought there; and the accruing interest on Mosher's debt to the bank was kept paid, it would seem, under the offer of proof that his renewal notes given in January, 1923, covering all of his debts to the Bank at that time were for a little less than $4,900. We think the amount named in the policy in excess of Mosher's indebtedness to the Bank at

the time it was issued, should be regarded, on the facts and offers of proof, as a wager on his death, and to that extent void and non-enforceable, because against public policy; and as to that the limitation of two years for contest is not a bar. Bromley's Adm. v. Washington Life Ins. Co., 92 S. W. 17; O'Connor's Adm. v. Equitable Life Assur. Society, 186 S. W. 502; Clement v. N. Y. Life Ins. Co., 46 S. W. 561. Furthermore, if as claimed, the policy was taken out by The Dazey State Bank to protect its interest as Mosher's creditor, liability of the insurer is limited to that interest as it existed at the time the policy was issued. In Conn. Mut. Life Ins. Co. v. Schaefer, supra, it is said: "And in cases where the insurance is effected merely by way of indemnity, as where a creditor insures the life of his debtor, for the purpose of insuring his debt, the amount of the insurable interest is the amount of the debt"; and further on in the opinion an English statute intended to discourage wagering is commented on, the words of the statute being "That no insurance shall be made on a life or lives wherein the assured shall have no interest, or by way of gaining or wagering," and "that in all cases where the insured (here The Dazey State Bank) hath interest in such life, etc., no greater sum shall be recovered than the amount or value of the interest." It was then said that this statute might almost be regarded "as declaratory of the original common law, and as indicating the proper rule to be observed in this country where that law furnishes the only rule of decision." A statute of North Dakota seems to have been intended for a like purpose. Sections 6628 and 6629, No. Dak. Compiled Laws 1913, provide that a creditor has an insurable interest in the life of his debtor, and that the policy may pass by transfer to any person, who may recover upon it whatever the insured might have recovered,—the insured being taken, as it was under the English statute, to be the one in whose interest the policy was taken out. See Grigsby v. Russell, 222 U. S. 149.

So we conclude on the facts stated that the policy was a good and valid contract to the extent of Mosher's indebtedness to The Dazey State Bank on May 14, 1920, and that [fol. 199] the court erred in excluding the tendered proof. If the tender should be made good and the case does not

present a materially different aspect from the record before us, plaintiff should have judgment for that amount, with interest from service of summons.

Reversed and remanded.

[fol. 200] In United States Circuit Court of Appeals

[Title omitted]

Judgment—April 12, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the Dakota Life Insurance Company, a Corporation, have and recover against the Midland National Bank of Minneapolis, a corporation, the sum of Four Hundred Fifty-Nine and 95/100 Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions for proceedings not inconsistent with the opinion of this Court.

[fols. 201-209] Petition for rehearing, covering 9 pages, filed May 19, 1927; omitted from this print. It was denied and nothing more by order May 26, 1927.

[fol. 210] In United States Circuit Court of Appeals

Order Denying Rehearing—May 26, 1927

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Defendant in Error.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

[fol. 211] In United States Circuit Court of Appeals

Clerk's Certificate

I, E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the Dakota Life Insurance Company was Plaintiff in Error and the Midland National Bank of Minneapolis was Defendant in Error, No. 7505, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the seventeenth day of June, A. D. 1927, a mandate was issued out of said Circuit Court of Appeals in this cause, directed to the Judges of the District Court of the United States for the District of Minnesota.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirtieth day of June, A. D. 1927.

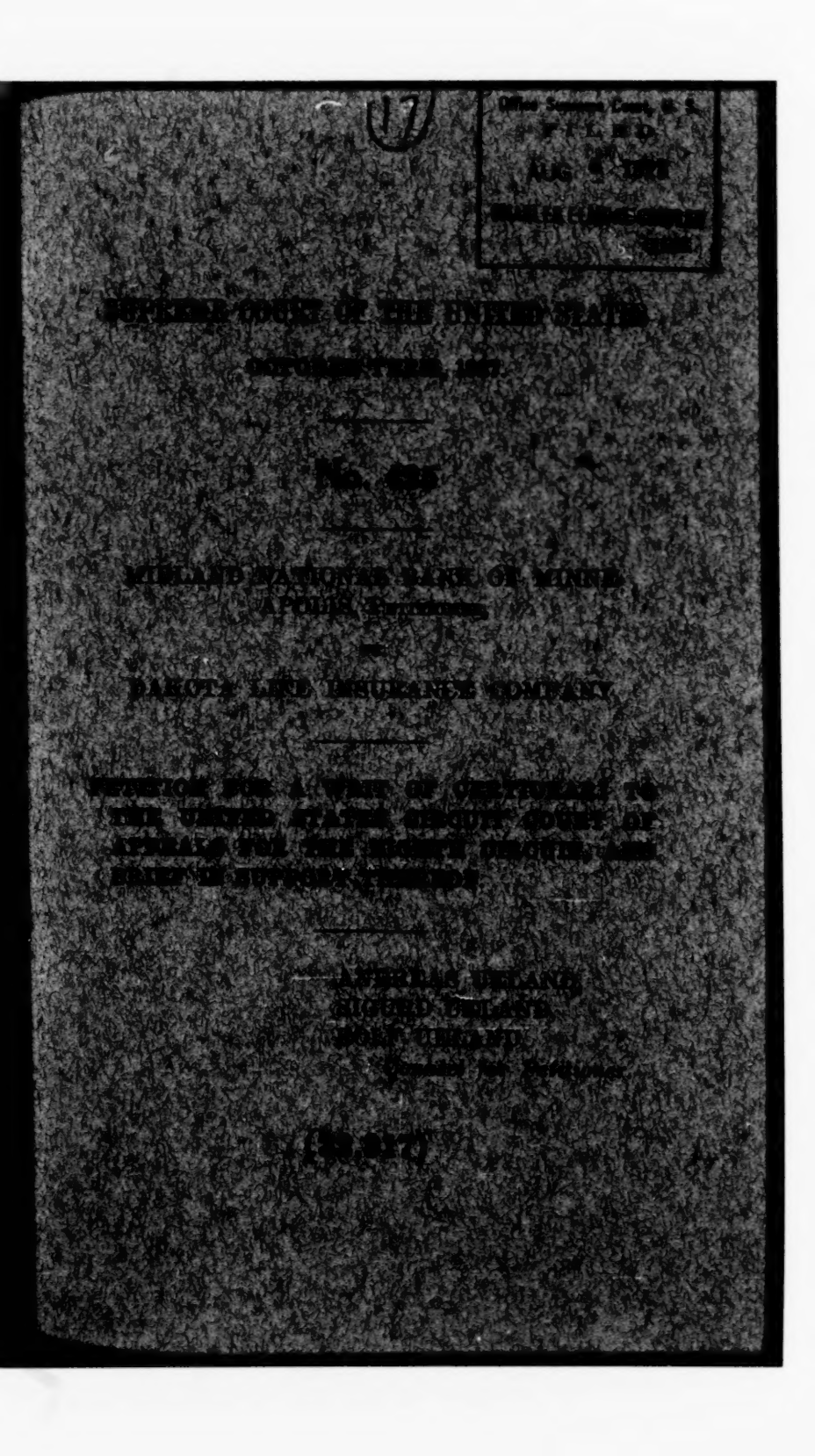
E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. (Seal United States Circuit Court of Appeals, Eighth Circuit.)

[fol. 212] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 31, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 32,877. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 425. Midland National Bank of Minneapolis, petitioner, vs. Dakota Life Insurance Company. Petition for writ of certiorari and exhibit thereto. Filed August 4th, 1927. File No. 32,877.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 425

MIDLAND NATIONAL BANK OF MINNEAPOLIS, PETITIONER,

vs.

DAKOTA LIFE INSURANCE COMPANY, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Midland National Bank of Minneapolis, a national banking association, respectfully submits its petition for a writ of certiorari to review the judgment of the United States Circuit Court of

Appeals for the Eighth Circuit in the above-entitled cause.

The Circuit Court of Appeals has reversed a judgment rendered in the District Court for the District of Minnesota in favor of the petitioner in the sum of $11,066.04.

I.

Nature of Controversy.

This was an action by the petitioner against the respondent to recover on a life insurance policy issued by the respondent on the life of one Oscar Mosher in the sum of $10,000. The policy was a North Dakota contract and was payable to the estate of the insured. Petitioner brought suit as assignee of Mosher and one J. E. Jacobson, who, by a prior assignment, appeared to have acquired some interest in the policy. The respondent originally pleaded fraud in connection with the procurement of the policy (R., 35-39*j*), but on motion the allegations as to fraud in the procurement of the policy were stricken out as irrelevant and redundant matter, because Section 6635*c*, N. D. Comp. Laws 1913, required the policy in question to contain "a provision that the policy shall constitute the entire contract between the parties and shall be incontestable after two years from its date, except for non-payment of premiums and except for violation of the conditions of the policy relating to naval and military services in time of war" (R., 40-45). There had been no contest within the two-year period. Thereafter on motion the respondent obtained leave to sub-

stitute an amended pleading, which appears in the record entitled, "Proposed Amended Answer to Amended Complaint" (R., 46-53). In this substituted pleading no question was raised as to the validity of the policy in its inception, but respondent set up lack of consideration and fraud in obtaining the assignment of the policy from Mosher, the insured. The earlier pleading had alleged an assignment of the policy to a creditor of Mosher, the Dazey State Bank (R., 39c), but the substituted pleading did not refer to this assignment. The respondent also set up a judgment of a North Dakota court, rendered upon default canceling the policy as to the administratrix of Mosher. This judgment was rendered in an action begun after the assignment of the policy to the petitioner, and it was conceded that no jurisdiction had been obtained over the petitioner in the action.

At the trial respondent made lengthy offers to prove by three witnesses, Sophia Mosher, Ladbury, and Bell, that there was a lack of consideration and possibly fraud practiced upon Mosher in connection with the execution and delivery to J. E. Jacobson of two $5,000 notes in January, 1923 (R., 102-107). It was these two $5,000 notes, which were endorsed by Jacobson to the petitioner, that the assignment to the petitioner was given to secure. It is important that *these offers had no reference whatever to what transpired with reference to the policy when issued in* 1920.

The offered testimony was excluded on the ground that it was immaterial and irrelevant matter and that proof of fraud practiced upon Mosher in procuring

an assignment of the policy would not constitute a defense available to the insurance company (R., 107-108). Judgment having been rendered for the full amount claimed by petitioner (R., 58), the cause came before the Circuit Court of Appeals on writ of error. For a more detailed statement see the annexed brief.

II.

Theory of the Judgment Below Reversing the Judgment of the District Court.

From the opinion of the Circuit Court of Appeals (R., 193) (18 F. (2d), 903) it appears that the proceedings in the District Court were sustained and reversed in the following particulars:

1. Sustained in holding that the North Dakota judgment or decree was not binding upon the petitioner.

2. Sustained in holding that lack of consideration or fraud practiced upon Mosher in connection with the assignment of the policy to the petitioner would not constitute a defense to respondent.

3. Sustained in holding that fraud in connection with the inception of the policy would not constitute a defense because of the incontestable clause required by the North Dakota statute.

4. Reversed for excluding the offered proof on the theory that such offered proof would have shown the policy to have been in part a wagering contract in its

inception; that to the extent the amount of the policy was in excess of Mosher's indebtedness to the Dazey State Bank when the policy was issued, which indebtedness was assumed by the court to have been $5,686.08 (although there was no allegation or proof as to the extent of such indebtedness), the policy was void and unenforceable in the hands of the petitioner. The court held that the incontestable clause required by the statute would not prevent the assertion of such a defense.

III.

Questions Presented.

I. Did the Circuit Court of Appeals err in reversing the judgment of the trial court on the sole ground that it excluded certain proof (1) where the proof excluded was entirely different from what the appellate court stated it to be; (2) where the excluded proof had nothing whatever to do with the inception of the policy as assumed by the appellate court, but had reference solely to an assignment thereof almost three years later; (3) where the excluded proof had no bearing on the point of wager, upon which the appellate court based its decision; (4) where the question of the wager was not in issue under the pleadings; (5) where the validity of the policy in the first instance was admitted by the pleadings; (6) where the question of wager was not litigated by consent and there was no evidence in the case tending to show that the policy was a wagering contract?

II. Even assuming that the offered proof was as the Circuit Court of Appeals stated it to be:

1. Does a clause required by statute that a policy shall be incontestable after two years from its date, except for non-payment of premiums and except for violation of the conditions of the policy relating to naval and military services in time of war, apply to the defense that the policy was a wager in its inception?

2. If so, is such an incontestable clause, which is required by the statute of the State where the policy is made and delivered, against public policy in so far as it applies to the defense that the policy is a wagering contract?

IV.

The Decision of the Circuit Court of Appeals.

The petitioner is advised and believes that the Circuit Court of Appeals in reversing the judgment of the District Court has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision; and has decided an important question of general law in a way probably untenable and in conflict with the weight of authority; all of which will appear more fully in the annexed brief.

ANDREAS UELAND,
SIGURD UELAND,
ROLF UELAND,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
District of Minnesota,
County of Hennepin, ss:

Sigurd Ueland being duly sworn, says that he is one of the counsel for the petitioner named in the foregoing petition and that he knows the contents of such petition and that the facts therein stated are true to the best of his knowledge and belief.

SIGURD UELAND.

Subscribed and sworn to before me this 18th day of July 1927.

[NOTARIAL SEAL.] MAUD GOLDSBURY,
Notary Public, Hennepin County, Minnesota.

My commission expires December 14, 1929.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 425

MIDLAND NATIONAL BANK OF MINNEAPOLIS, PETITIONER,

vs.

DAKOTA LIFE INSURANCE COMPANY, RESPONDENT.

PETITIONER'S BRIEF.

Statement.

The petitioner brought this action in a state court against respondent who caused the action to be removed to the United States District Court for Minnesota on the ground of diversity of citizenship (R., 1-10). The pleadings were there several times amended. There was a Complaint (R., 2-4), and Amended Answer (R., 10-23), and Amended Complaint (R., 24-35), and Answer to Amended Complaint (R., 35-39*j*). A

large part of the Answer to the Amended Complaint was stricken out on motion on the ground that the stricken portions were sham, irrelevant, and redundant matter (R., 40-45). Thereafter on motion respondent obtained leave to amend its pleading by substituting an amended answer which appears in the record entitled "Proposed Amended Answer to Amended Complaint" (R., 46-53). To this petitioner filed its Reply (R., 53-55).

Thus, when the parties came to trial, the issues were framed by the Amended Complaint, the so-called "Proposed Amended Answer to Amended Complaint" and the Reply. It should be helpful to understand what these issues were.

The Amended Complaint alleged that on May 14, 1920, in the State of North Dakota, respondent made and delivered to one Oscar Mosher a policy of insurance on the life of said Mosher in the sum of $10,000. The policy was payable to the estate of Mosher (R., 24). So much was admitted by respondent because not denied either generally or specifically. Petitioner also alleged that on October 10, 1921, Mosher assigned the policy to one J. E. Jacobson (R., 24, 25). This was not denied by respondent's pleading, but respondent alleged that this assignment was to secure a pre-existing indebtedness in the sum of $5,686.08, then owing by Mosher to the Dazey State Bank, of which Jacobson was president (R., 47). The Amended Complaint alleged further that on February 26, 1923, both Mosher and Jacobson assigned the policy to petitioner (R., 25). This assignment recited that it was "given to

secure the payment'' to petitioner of ''the sum of Ten Thousand and 00/100 Dollars, according to the tenor and conditions of two promissory notes'' (R., 34). Respondent admitted the execution of this assignment (R., 49), but alleged that on January 13, 1923, two $5,000 notes were obtained from Mosher and his wife as makers, payable to the order of Jacobson, by means of fraudulent misrepresentations that such notes were in renewal of an indebtedness of the Moshers to the Dazey Bank in the sum of $4,193.84, whereas there was in fact no indebtedness whatever owing to Jacobson, and that the assignment of February 26, 1923, was also obtained from Mosher through the fraudulent misrepresentation that it was given to secure the said indebtedness to the Dazey State Bank rather than the two $5,000 notes (R., 48, 49). In this connection respondent also conceded that the two $5,000 notes were endorsed by Jacobson to petitioner as collateral security to a pre-existing indebtedness of Jacobson to petitioner in a larger amount. The other allegations in the Amended Complaint setting forth the death of Mosher, the payment or extension of premiums, the giving of notice and proof of death by petitioner were not controverted.

The respondent pleaded a decree in a State court in North Dakota, in a suit commenced June 19, 1923, to which petitioner concededly was not a party, cancelling the policy as against the administratrix of Mosher (R., 49, 50).

Petitioner proved at the trial in support of the allegations in the Reply (R., 53-55) that the two $5,000

notes endorsed by Jacobson were received by it on March 2, 1923, as collateral security for a larger indebtedness on the part of Jacobson to petitioner; that the policy and two assignments were received at the same time as collateral for the two $5,000 notes (the policy thus being [illegible] Jacobson's indebtedness and liability to pe[illegible] that petitioner became the absolute owner of the two $5,000 notes through foreclosure sale of the pledged property and that nothing was ever paid on the notes (R., 69-83).

Respondent's offer of an authenticated copy of the findings and judgment in the North Dakota action was refused on the ground that the exhibit was immaterial and irrelevant (R., 96, 97, 167-175).

Respondent also made a lengthy offer to prove by three witnesses, Sophia Mosher, Ladbury and Bell, that there was a lack of consideration and (possibly) fraud practiced upon Mosher in connection with the delivery of the two $5,000 notes in January, 1923 (R., 102-107). *These offers had no reference whatever to what transpired in connection with the issuance of the policy in 1920.* The offered testimony was excluded on the ground that it was immaterial and irrelevant matter, and that proof of fraud practiced upon Mosher in procuring an assignment of the policy would not constitute a defense available to the insurance company (R., 107-108).

Both parties having moved for a directed verdict (R., 109), the trial judge made a general finding in favor of petitioner for the full amount claimed (R.,

57). See opinion, R., 58-61. Judgment was entered accordingly (R., 58).

The cause thereupon came before the Circuit Court of Appeals for the Eighth Circuit upon writ of error. There were six assignments of error as follows:

> 1 and 2, assigning the order of the trial court in striking out portions of the Answer to the Amended Complaint (R., 179).
>
> 3, assigning the exclusion from evidence of the North Dakota judgment (R., 180).
>
> 4, 5, and 6, assigning the denial of the offers of proof by witnesses Sophia Mosher, Ladbury and Bell (R., 180-182).

In its opinion (by Lewis, J.) the appellate court sustained the trial court as to the matters covered by assignments 1, 2, and 3, *supra* (R., 193-198). But in paragraph numbered 4 of the opinion the court held that "on the proof and the tendered and rejected proof" the policy was a wagering contract and void in its inception in 1920 except to the extent of the then indebtedness of Mosher, the insured, to the Dazey State Bank. The opinion erroneously stated such indebtedness "the answer alleged, amounted to $5,686.08 at the time the policy issued" (R., 194). In fact there was no evidence or allegation showing what, if any, indebtedness there was at that time.

Section 6635*c* of the Compiled Laws of North Dakota, 1913, required the policy in question to contain "a provision that the policy shall constitute the entire contract between the parties and shall be incontestable

after two years from its date, except for non-payment of premiums and except for violations of the conditions of the policy relating to naval and military services in time of war." While the Circuit Court of Appeals held that this provision barred proof of fraud in the procurement of the policy (thereby sustaining the order of the trial court striking out portions of the answer to the Amended Complaint wherein such fraud had been alleged), it also held that such an incontestable clause would not bar a defense that the policy was a wagering contract, notwithstanding the lapse of more than two years.

The petitioner filed a petition for rehearing (R., 199-205), which was denied May 26, 1927, without further opinion (R., 206).

ARGUMENT.

First Point

The circuit court of appeals has reversed the district court on matters of fact and on a point of law that were not before the district court.

1. It is stated at the beginning of the opinion of the court below:

> "The questions that are reviewable on this writ relate to the exclusion of offered proof in the light of the pleadings * * *." (R., 193.)

And at the end of the opinion the court says:

> "So we conclude on the facts stated that the policy was a good and valid contract to the extent of Mosher's indebtedness to the Dazey

> State Bank on May 14, 1920, and that the court erred in excluding the tendered proof. If the tender should be made good and the case does not present a materially different aspect from the record before us, plaintiff should have judgment for that amount, with interest from service of summons." (R., 198.)

From this it sufficiently appears that the reversal was based solely on the exclusion of proof at the trial.

2. As already stated the validity of the policy in its inception in 1920 was not in issue under the pleadings, but on the contrary admitted. As already stated the excluded proof had reference only to matters alleged to have transpired in 1923 in connection with the assignment of the policy to petitioner.

The only possible questions in the case when the parties came to trial were:

> 1. Was fraud practiced upon the assignor of the policy and, if so, would it be a defense to the insurance company?
>
> 2. Was the decree of cancellation of the policy by the North Dakota court a defense to the insurance company?
>
> 3. Was petitioner entitled to a full recovery, having received the two $5,000 notes, and the assignment of the policy as collateral security for a pre-existing indebtedness?

It is certain that no other questions were considered to be in the case by the trial judge. See opinion (R., 58-61).

We quote from the statement in the opinion of the Circuit Court:

> "That company (respondent) offered to show that the policy was applied for and issued at the instigation of Jacobson; that he retained possession of it for the Dazey State Bank; that Mosher assigned it to that bank when it was issued and that bank paid the first and all other premiums; * * * that at the time and for some time theretofore Mosher had tubercular consumption in an advanced state and continued in that condition until his death which occurred on September 10, 1923; * * * that Mosher never had or kept the policy under his control, that it was taken out by and solely for the benefit of his creditor, the Dazey State Bank * * *." (R., 194-195.)

To one who reads the opinion carefully it becomes obvious that the entire texture of the wager argument it built upon the foregoing recitals. *Yet the matters stated were not contained in the rejected offers of proof; they were not even alleged in the pleadings as amended when the parties came to trial; there was no evidence of such matters actually received or offered.* There was nothing, absolutely nothing, in the amended pleadings, the evidence received, or the rejected proof out of which the court could weave a wager contract. A reversal of the judgment of the trial court based upon such a profound misapprehension of the record is, in our experience, quite without precedent. Yet the petition for rehearing wherein these manifest errors were pointed out was denied without further opinion.

If the judgment of the Circuit Court of Appeals is not reviewed and reversed, the district court will be confronted with several embarrassing questions upon the new trial. Is the proof which that court is required to receive the proof actually offered on the first trial, or the proof which the appellate court says was offered? If the latter, is the trial court to permit amendments of the pleadings so that issues will be raised which are in conformity with the evidence?

3. It seems to us that the reversal of the judgment of the trial court for the exclusion of testimony, which in fact was never offered, and which, if it had been offered, would not have been relevant to any issue in the case, was a departure "from the accepted and usual course of judicial proceedings," as that phrase is used in Rule 35 of this Court. If not, it is difficult to conceive what would be such a departure. We submit that this Court should exercise its power of supervision in extreme cases like the present in order that the great confidence which the bar and public now has in the Federal judiciary may be maintained.

Second Point.

Even if the Record were as the court below understood it to be the incontestable clause would bar any controversy as to the validity of the policy in its inception.

1. In a limited number of cases the courts have held that an incontestable clause in a life insurance policy, in so far as the defense of wager or lack of insurable

interest is concerned, is contrary to public policy and ineffectual *pro tanto* even after the contestable period has expired.

Bromley's Ad'r *vs.* Washington Life Ins. Co., 122 Ky., 402; 92 S. W., 17.

Clement *vs.* N. Y. Life Ins. Co., 101 Tenn., 22; 46 S. W., 561.

Contra:

Wright *vs.* Mutual Benefit Life Assn., 118 N. Y., 237.

2. Where a life insurance policy is issued with the consent of the person whose life is insured, it is difficult to see why the incontestable clause should not bar the assertion that the real beneficiary had no insurable interest in the life insured. In such cases the only valid objection that can be made to enforcing the contract is that it is in the nature of a bet on the part of the party effecting the insurance as to the duration of the life insured.

See Grigsby *vs.* Russell, 222 U. S., 149.

There is no sound reason why the law should take a more violent objection to such a transaction than to a contract of insurance procured by fraud. As to fraud the authorities are agreed that the lapse of a reasonable period specified by an incontestable clause will be a bar.

Mutual Life Insurance Co. *vs.* Hurni Company, 263 U. S., 167.

3. The decisions adverse to petitioner's contention are all cases where the incontestable clause was a private arrangement between the parties which was considered to contravene public policy. Such decisions have no application where the incontestable clause is required by the governing statute. Public policy is to be determined by the appropriate legislatures, in this case the North Dakota legislature. *When that legislature has said that the policy shall be incontestable after two years, it is indefensible for any court to hold that it knows better about public policy, or to read exceptions into the clause which are not there.*

In Whitfield *vs.* Ætna Life Ins. Co., 205 U. S., 489, this Court said:

> "An insurance company is not bound to make a contract which is attended by the results indicated by statute in question. If it does business at all in the State, it must do so subject to such valid regulations as the State may choose to adopt. Even if the statute in question could be fairly regarded by the court as inconsistent with public policy or sound morality it cannot for that reason alone be disregarded; for it is the province of the State by its legislature to adopt such a policy as it deems best, provided it does not, in so doing, come into conflict with the Constitution of the State or the Constitution of the United States."

4. In Northwestern Life Ins. Co. *vs.* Johnson, 254 U. S., 96, this Court held that an incontestable clause reading—"This contract shall be incontestable after one year from the date of its issue, provided the re-

quired premiums are duly paid" could only be construed as barring the defense of suicide after the period indicated. Mr. Justice Holmes said in the opinion:

> "The public policy with regard to such contracts is a matter for the States to decide. * * * The object of the clause is plain and laudable—to create an absolute assurance of the benefit, as free as may be from any dispute of fact except the fact of death, and as soon as it reasonably can be done. It is said that the insurance companies now generally issue policies with such a clause. The State decisions, so far as we know, have upheld it. Unless it appears that the State concerned adopts a different attitude we should uphold it here."
>
> See also Lee *vs.* Southern Life & Health Co., 19 Ala. App., 535; 98 So., 696.

Public policy is concerned as much with suicide as with the absence of insurable interest. Accordingly the decision of the Circuit Court of Appeals seems repugnant to the rules laid down in the Johnson case as well as opposed to sound principles.

5. The question here presented is one of considerable importance. The volume of life-insurance contracts written in this country is staggering. There is a great deal of State legislation as to provisions required in such contracts, standard forms, etc. If, notwithstanding such legislative requirements, the Federal courts should hold REQUIRED provisions to be against public policy or otherwise inoperative, it would be a matter of considerable consequence.

THIRD POINT.

Even if the Record were as the court below understood it to be, that court erred in holding the policy a wagering contract as a matter of law.

1. Even if the circuit court of appeals had been correct and the reception of the offered proof would have established that the policy had been taken out for the protection of the Dazey State Bank as a creditor of the life insured, in the sum of $5,686.08 according to the court's understanding, it was error for the court to hold that the policy was invalid as to the excess over the then indebtedness as a matter of law.

The rule is that where a creditor insures or causes to be insured the life of his debtor he is entitled to recover the full amount of the insurance unless there is such a gross discrepancy between the amount of the debt and the amount of the insurance that the transaction shows on its face that it is a mere wager. The dictum in Connecticut Mutual Life Ins. Company *vs.* Schaefer, 94 U. S., 457, 462, that "the amount of insurable interest is the amount of the debt" does not accurately state the law on this subject.

Insurance Company *vs.* Bailey, 13 Wall., 616, 619.

Insurance Company *vs.* Mowry, 96 U. S., 544, 545.

Connecticut Mut. Life Ins. Co. *vs.* Lucks, 108 U. S., 498.

Sides *vs.* Knickerbocker Life Ins. Co., 16 Fed., 650.

Amick *vs.* Butler, 111 Indiana, 578.
Rittler *vs.* Smith, 70 Maryland, 261; 16 Atl., 890.
37 Corpus Juris, 396.

Now a $10,000 policy to secure an indebtedness of $5,686.08, when the interest to accrue on the indebtedness and the cost of maintaining the insurance is taken into consideration (in this case the annual premium was $394.20; R., 28) is not such a gross discrepancy as to show bad faith. On the contrary such a substantial indebtedness, in the light of the decisions on the subject, would appear to take the question of insurable interest out of the case.

In the decision of the Circuit Court of Appeals it is said:

> "The insurable interest of the Dazey State Bank was limited to an account reasonably adequate to cover Mosher's indebtedness to it and premiums which it would have to pay and interest." (R., 197.)

But in what follows and in the conclusion of the opinion there is language from which respondent will contend, in case of a new trial, that petitioner's recovery is limited to the exact indebtedness at the time the policy was issued. The effect of this would be to make the question of insurable interest when the policy is issued depend on subsequent events, such as the amount of premiums paid, interest accumulated, etc. Such a rule is contrary to sound principles.

Conn. Mutual Life Ins. Co. *vs.* Schaefer, 94 U. S., 457.

The decision of the court below also seems in conflict with the North Dakota statutes dealing with this subject:

> "Every person has an insurable interest in the life and health * * * Of any person under a legal obligation to him for the payment of money, or respecting property or services, of which death or illness might delay or prevent the performance * * *." Comp. L. 1913, Sec. 6628.
>
> "Unless the interest of a person insured is susceptible of exact pecuniary measurement, the measure of indemnity under a policy of insurance upon life or health is the sum fixed in the policy." Id., Sec. 6631.

If there was any question of insurable interest under the court's view of the record, that question would be determined by the good faith or bad faith of the creditor, the Dazey State Bank. That question was for the jury.

Cooley, Briefs on Insurance, Vol. I, page 328.

In the public interest, as well as in justice to the petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREAS UELAND,
SIGURD UELAND,
ROLF UELAND,
Attorneys for Petitioner.

(7034)

Office Supreme Court, U. S.
FILED
FEB 25 1928
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 425.

MIDLAND NATIONAL BANK OF MINNEAPOLIS,
Petitioner,

vs.

DAKOTA LIFE INSURANCE COMPANY,
Respondent.

Petitioner's Brief

ANDREAS UELAND,
SIGURD UELAND,
Attorneys for Petitioner,
Minneapolis, Minnesota.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 425.

MIDLAND NATIONAL BANK OF MINNEAPOLIS,
Petitioner,

vs.

DAKOTA LIFE INSURANCE COMPANY,
Respondent.

Petitioner's Brief

STATEMENT.

The petitioner brought this action in a state court against respondent who caused the action to be removed to the United States District Court for Minnesota on the ground of diversity of citizenship (R. 1-7). The pleadings were several times amended. There was a Complaint (R. 1-3), an Amended Answer (R. 8-22), an Amended Complaint (R. 22-34), an Answer to Amended Complaint (R. 34-49). In the Answer to Amended Complaint the respondent pleaded fraud in connection with the procurement of the policy, but on motion the allegations as to fraud in the procurement of the policy were stricken out as irrelevant and redundant matter, because Section 6635c, North Dakota Compiled Laws 1913, required the policy in question to contain "a provision that the policy shall

constitute the entire contract between the parties and shall be incontestable after two years from its date, except for non-payment of premiums and except for violation of the conditions of the policy relating to naval and military services in time of war" (R. 49-54). There had been no contest within the two-year period. Thereafter on motion the respondent obtained leave to substitute an amended pleading, which appears in the record entitled, "Proposed Amended Answer to Amended Complaint" (R. 56-61). In this substituted pleading no question was raised as to the validity of the policy in its inception. To this petitioner filed its Reply (R. 62-64).

Thus, when the parties came to trial, the issues were framed by the Amended Complaint, the so-called "Proposed Amended Answer to Amended Complaint" and the Reply. It should be helpful to understand what these issues were.

The Amended Complaint alleged that on May 14, 1920, in the State of North Dakota, respondent made and delivered to one Oscar Mosher a policy of insurance on the life of said Mosher in the sum of $10,000. The policy was payable to the estate of Mosher (R. 23). So much was admitted by respondent because not denied either generally or specifically.

Petitioner also alleged that on October 10, 1921, Mosher assigned the policy to one J. E. Jacobson (R. 23). This was not denied by respondent's pleading, but respondent alleged that this assignment was to secure a pre-existing indebtedness in the sum of $5,686.08, then owing by Mosher to the Dazey State Bank, of which Jacobson was president (R. 56).

The Amended Complaint alleged further that on February 26, 1923, both Mosher and Jacobson assigned the policy to petitioner (R. 23, 24). This assignment recited that it was "given to secure the payment" to petitioner

of "the sum of Ten Thousand and 00/100 Dollars, according to the tenor and conditions of two promissory note" (R. 33). Respondent admitted the execution of this assignment (R. 58), but alleged that on January 13, 1923, two $5,000 notes were obtained from Mosher and his wife as makers, payable to the order of Jacobson, by means of fraudulent misrepresentations that such notes were in renewal of an indebtedness of the Moshers to the Dazey Bank in the sum of $4,193.84, whereas there was in fact no indebtedness whatever owing to Jacobson, and that the assignment of February 26, 1923, was also obtained from Mosher through the fraudulent misrepresentation that it was given to secure the said indebtedness to the Dazey State Bank rather than the two $5,000 notes (R. 57, 58). In this connection respondent also conceded that the two $5,000 notes were endorsed by Jacobson to petitioner as collateral security to a pre-existing indebtedness of Jacobson to petitioner in a larger amount.

The other allegations in the Amended Complaint setting forth the death of Mosher, the payment or extension of premiums, the giving of notice and proof of death ~~of~~ by petitioner were not controverted.

The respondent pleaded a decree in a State court in North Dakota, in a suit commenced June 19, 1923, to which petitioner concededly was not a party, cancelling the policy as against the administratrix of Mosher (R. 59-60).

Petitioner proved at the trial that the two $5,000 notes endorsed by Jacobson were received by it on March 2, 1923, as collateral security for a larger indebtedness on the part of Jacobson to petitioner; that the policy and two assignments were received at the same time as collateral for the two $5,000 notes (the policy thus being sub-collateral for Jacobson's indebtedness and liability to petitioner); that petitioner became the absolute owner of the two $5,000 notes through foreclosure sale of the

pledged property and that nothing was ever paid on the notes (R. 77-96).

Respondent's offer of an authenticated copy of the findings and judgment in the North Dakota action was refused on the ground that the exhibit was immaterial and irrelevant (R. 109, 175-184).

Respondent also made a lengthy offer to prove by three witnesses, Sophia Mosher, Ladbury and Bell, that there was a lack of consideration and (possibly) fraud practiced upon Mosher in connection with the delivery of the two $5,000 notes in January, 1923. These offers had no reference whatever to what transpired in connection with the issuance of the policy in 1920. The offered testimony was excluded on the ground that it was immaterial and irrelevant matter, and that proof of fraud practiced upon Mosher in procuring an assignment of the policy would not constitute a defense available to the insurance company (R. 114-122).

Both parties having moved for a directed verdict (R. 122-123), the trial judge made a general finding in favor of petitioner for the full amount claimed (R. 66). See opinion, R. 67-70. Judgment was entered accordingly (R. 66, 67).

The cause thereupon came before the Circuit Court of Appeals for the Eighth Circuit upon writ of error. There were six assignments of error as follows:

> I and II, assigning the order of the trial court in striking out portions of the Answer to the Amended Complaint (R. 188).
>
> III, assigning the exclusion from evidence of the North Dakota judgment (R. 189).
>
> IV, V, and VI, assigning the denial of the offers of proof by witnesses Sophia Mosher, Ladbury and Bell (R. 190-192).

In its opinion (by Lewis, J.) the appellate court sustained the trial court as to the matters covered by assignments I, II, and III, *supra* (R. 197-200). But in paragraph numbered 4 of the opinion the court held that "on the proof and the tendered and rejected proof" the policy was a wagering contract and void in its inception in 1920 except to the extent of the then indebtedness of Mosher, the insured, to the Dazey State Bank. The opinion erroneously stated such indebtedness "the answer alleged, amounted to $5,686.08 at the time the policy issued" (R. 198). In fact there was no evidence or allegation showing what, if any, indebtedness there was at that time. The judgment of District Court was accordingly reversed (R. 202). See 18 F. (2d) 903.

The petitioner filed a petition for rehearing which was denied May 26, 1927, without further opinion (R. 202-203).

Certiorari was granted October 31, 1927.

ANALYSIS OF THE JUDGMENT BELOW REVERSING THE JUDGMENT OF THE DISTRICT COURT.

From the opinion of the Circuit Court of Appeals it appears that the proceedings in the District Court were sustained and reversed in the following particulars:

1. Sustained in holding that the North Dakota judgment or decree was not binding upon the petitioner.

2. Sustained in holding that lack of consideration or fraud practiced upon Mosher in connection with the assignment of the policy to the petitioner would not constitute a defense to respondent.

3. Sustained in holding that fraud in connection with the inception of the policy would not constitute a defense because of the incontestable clause required by the North Dakota statute.

4. Reversed for excluding the offered proof on the

theory that such offered proof would have shown the policy to have been in part a wagering contract in its inception. The court held that the incontestable clause required by the statute would not prevent the assertion of such a defense.

SUMMARY OF ARGUMENT.

Respondent has not petitioned for certiorari and if we understand the practice of this Court the correctness of the decision of the Circuit Court of Appeals will not be questioned except in respect to the errors asserted in the petition for certiorari.

Federal Trade Com'n v. Pacific States Paper Trade Ass'n, 47 Sup. Ct. Rep. 255, 259.

Accordingly we do not cite in the ensuing argument the authorities in support of the judgment of the District Court as against Assignments of Error I, II, and III (R. 188-190). We will urge only the errors assigned in the petition for certiorari and supporting brief, viz.:

1. The Circuit Court of Appeals has reversed the District Court on matters of fact and on a point of law that were not before the District Court.

2. Even if the record were as the Circuit Court of Appeals understood it to be, the incontestable clause would bar any controversy as to the validity of the policy in its inception.

3. Even if the record were as the Court below understood it to be, that Court erred in holding the policy a wagering contract as a matter of law.

ARGUMENT.

First Point.

The Circuit Court of Appeals Has Reversed the District Court on Matters of Fact and on a Point of Law that Were Not Before the District Court.

1. It is stated at the beginning of the opinion of the court below:

> "The questions that are reviewable on this writ relate to the exclusion of offered proof in the light of the pleadings * * *" (R. 197).

And at the end of the opinion the court says:

> "So we conclude on the facts stated that the policy was a good and valid contract to the extent of Mosher's indebtedness to the Dazey State Bank on May 14, 1920, and that the court erred in excluding the tendered proof. If the tender should be made good and the case does not present a materially different aspect from the record before us, plaintiff should have judgment for that amount, with interest from service of summons" (R. 201).

From this it sufficiently appears that the reversal was based solely on the exclusion of proof at the trial.

2. As already shown the validity of the policy in its inception in 1920 was not in issue under the pleadings, but on the contrary admitted. As already stated the excluded proof had reference only to matters alleged to have transpired in 1923 in connection with the assignment of the policy to petitioner.

The only possible questions in the case when the parties came to trial were:

> 1. Was fraud practiced upon the assignor of the policy and, if so, would it be a defense to the insurance company?
>
> 2. Was the decree of cancellation of the policy by the North Dakota court a defense to the insurance Company?

3. Was petitioner entitled to a full recovery, having received the two $5,000 notes, and the assignment of the policy as collateral security for a pre-existing indebtedness?

It is certain that no other questions were considered to be in the case by the trial judge. See opinion (R. 67-70).

We quote from the statement in the opinion of the Circuit Court of Appeals:

> "That company (respondent) offered to show that the policy was applied for and issued at the instigation of Jacobson; that he retained possession of it for the Dazey State Bank; that Mosher assigned it to that bank when it was issued and that bank paid the first and all other premiums; * * * that at the time and for some time theretofore Mosher had tubercular consumption in an advanced state and continued in that condition until his death which occurred on September 10, 1923; * * * that Mosher never had or kept the policy under his control, that it was taken out by and solely for the benefit of his creditor, the Dazey State Bank; * * *" (R. 198).

To one who reads the opinion carefully it becomes obvious that the entire texture of the wager argument is built upon the foregoing recitals. *Yet the matters stated were not contained in the rejected offers of proof; they were not even alleged in the pleadings as amended when the parties came to trial; there was no evidence of such matters actually received or offered.* There was nothing, absolutely nothing, in the amended pleadings, the evidence received, or the rejected proof out of which the court could weave a wager contract. A reversal of the judgment of the trial court based upon such a profound misapprehension of the record is, in our experience, quite without precedent. Yet the petition for rehearing wherein these manifest errors were pointed out was denied without further opinion.

If the judgment of the Circuit Court of Appeals is not reversed, the District Court will presumably receive the

excluded testimony. What then? Is the District Court to hold the policy in part a wagering contract although there is still no such issue and no such testimony in the case? The only solution for this difficulty that occurs to us is that the judgment of the Circuit Court of Appeals be reversed.

3. It has been suggested on behalf of respondent that the decision of the Circuit Court of Appeals must be considered as reversing the judgment of the District Court on the ground that the District Court improperly struck out on motion a part of the Answer to Amended Complaint. It is contended that the stricken pleading tendered the defense that the insurance policy was a wagering contract.

There is no ground for such an assertion; the language of the decision of the Circuit Court of Appeals is too clear to permit of doubt that the reversal was based upon what the Circuit Court of Appeals thought was excluded as evidence.

Furthermore the Answer to Amended Complaint did not raise the defense that the insurance policy was a wager. This pleading set forth that at the date of the policy Mosher was indebted to the Dazey State Bank "in a substantial sum of money, the exact amount whereof is unknown to this defendant" (R. 36). It set forth an assignment of the policy to the Dazey State Bank in furtherance of an alleged conspiracy to defraud the insurance company by misrepresenting the state of health of the insured (R. 42). The gist of the defense of the Answer to Amended Complaint was fraud and conspiracy to defraud; it was not contended that the Dazey State Bank was not a creditor of the insured in a sufficient amount to give it an insurable interest. As a matter of fact the District Court did not strike the allegations with respect to the indebtedness of the insured to the Dazey State Bank

or the allegation that the policy was assigned to the Dazey State Bank (R. 49-51). These allegations were abandoned by respondent itself when it sought and obtained leave to substitute the "Proposed Amended Answer to Amended Complaint" "in lieu of said answer to the amended complaint" (R. 55-61). In the substituted pleading neither the indebtedness of the insured to the Dazey State Bank at the inception of the policy or the assignment of the policy to that bank is mentioned.

Respondent elected to go to trial upon entirely different defenses from those found in the pleading which had been partially stricken. Under such circumstances it is established law that any error in striking the abandoned pleading is waived. It would be superfluous to cite cases in support of this elementary proposition. The decisions are collected in 3 *Corpus Juris*, p. 667, Sec. 538. Any other rule would be absurd because upon reversal of the judgment of the trial court and a new trial the issues would still be framed by the substituted pleading, and the new trial could not be expected to reach a different result.

The order striking out parts of the first answer to the Amended Complaint was not subject to review for the further reason that no exception was taken by respondent or preserved by incorporation in the bill of exceptions.

Ghost v. United States, 168 Fed. 841 (C. C. A. 8th Cir.).

Dietz v. Lymer, 61 Fed. 792 (C. C. A. 8th Cir.).

Denver, etc., Ry. Co. v. Wagner, 167 Fed. 75 (C. C. A. 8th Cir.).

In the light of the language of the decision of the Circuit Court of Appeals, as well as the foregoing considerations, the abandoned Answer to Amended Complaint does not call for further consideration.

4. It was error for the Circuit Court of Appeals to reverse the judgment of the District Court on the sole

ground that the District Court had excluded certain proof for the following reasons:

1. The proof excluded was entirely different from what the appellate court stated it to be.
2. The excluded proof had nothing whatever to do with the inception of the policy as assumed by the appellate court, but had reference solely to an assignment of the policy almost three years later.
3. The excluded proof had no bearing on the point of wager upon which the appellate court based its decision.
4. The question of wager was not an issue under the pleadings.
5. The validity of the policy in the first instance was admitted by the pleading.
6. The question of wager was not litigated by consent and there was no evidence in the case having a tendency to show that the policy was a wagering contract.

Second Point.

Even If the Record Were as the Court Below Understood It to Be, the Incontestable Clause Would Bar Any Controversy as to the Validity of the Policy in Its Inception.

1. A few courts have held that an incontestable clause in a life insurance policy, in so far as the defense of wager or lack of insurable interest is concerned, is contrary to public policy and ineffectual *pro tanto* even after the contestable period has expired.

Bromley's Ad'r v. Washington Life Ins. Co., 129 Ky. 402; 92 S. W. 17.

Clement v. N. Y. Life Ins. Co., 101 Tenn. 22; 46 S. W. 561.

The New York court has taken what appears to be the better view that the incontestable clause applies to the defense of lack of insurable interest, in the same way that

it would apply to any other defense not expressly excepted by its terms.

Wright v. Mutual Benefit Life Ass'n, 118 N. Y. 237.

2. In cases of fraud the authorities are agreed that the lapse of a reasonable time specified by an incontestable clause will be a bar to the assertion of the defense.

Mutual Life Insurance Co. v. Hurni Co., 263 U. S. 167.

Great Southern Life Ins. Co. v. Russ, 14 F. (2d) 27.

Plotner v. Northwestern National Life Ins. Co., 48 N. D. 295; 193 N. W. 1000.

In a case like the present where the policy of insurance is issued with the consent of the person whose life is insured, there seems to be no reason why there should be a stronger public policy against the policy becoming enforceable than in cases where the policy was procured through fraud. We think this is shown by the rule adopted by this court that a valid life insurance policy may be assigned by the insured to one who has no insurable interest in his life.

Grigsby v. Russell, 222 U. S. 149.

The House of Lords has called the defense of want of insurable interest "a shabby thing."

Burnand v. Rodocanachi, 7 App. Cas. 333, 340.

This language seems especially appropriate where the defense is asserted (or assumed to be so asserted by the Circuit Court of Appeals) by an insurance company against an assignee whose assignment was formally approved by the company almost three years after the policy was issued (R. 34). Life insurance policies have a rapidly increasing significance in the commercial world as collateral security. The incontestable clause is intended to give such policies, after the prescribed period has elapsed, a value which is comparable to the value given to commercial paper by reason of its negotiable character. For this

reason alone the decision of the Circuit Court of Appeals seems most unfortunate.

3. The few decisions which hold that the incontestable clause does not operate upon the defense of want of insurable interest were all cases where the incontestable clause was a private arrangement between the parties, which was considered to contravene public policy. Such decisions certainly have no application where the incontestable clause is required by the governing statute. Public policy is to be determined by the appropriate legislature, in this case the North Dakota legislature. *When that legislature has said that the policy shall be incontestable after two years, it is indefensible for any court to hold that it knows better about public policy, or to read exceptions into the clause which are not there.*

In *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489, this court said:

> "An insurance company is not bound to make a contract which is attended by the results indicated by statute in question. If it does business at all in the State, it must do so subject to such valid regulations as the State may choose to adopt. Even if the statute in question could be fairly regarded by the court as inconsistent with public policy or sound morality it cannot for that reason alone be disregarded; for it is the province of the State by its legislature to adopt such a policy as it deems best, provided it does not, in so doing, come into conflict with the Constitution of the State or the Constitution of the United States."

4. In *Northwestern Life Ins. Co. v. Johnson*, 254 U. S. 96, this court held that an incontestable clause reading—"This contract shall be incontestable after one year from the date of its issue, provided the required premiums are duly paid" could only be construed as barring the defense of suicide after the period indicated. Mr. Justice Holmes said in the opinion:

> "The public policy with regard to such contracts is a matter for the States to decide. * * * The object of the clause is plain and laudable—to create an absolute assurance of the benefit, as free as may be from any dispute of fact except the fact of death, and as soon as it reasonably can be done. It is said that the insurance companies now generally issue policies with such a clause. The State decisions, so far as we know, have upheld it. Unless it appears that the State concerned adopts a different attitude we should uphold it here."

On principle the Johnson case cannot be distinguished from the case at bar.

Third Point.

Even If the Record Were as the Court Below Understood It to Be, That Court Erred in Holding the Policy a Wagering Contract as a Matter of Law.

1. Even if the Circuit Court of Appeals had been correct and the reception of the offered proof would have established that the policy had been taken out for the protection of the Dazey State Bank as a creditor of the life insured, in the sum of $5,686.08 according to the court's understanding, it was error to hold that the policy was invalid as to the excess over the then indebtedness as a matter of law.

The rule is that where a creditor insures or causes to be insured the life of his debtor he is entitled to recover the full amount of the insurance unless there is such a gross discrepancy between the amount of the debt and the amount of the insurance that the transaction shows on its face that it is a mere wager. The dictum in *Connecticut Mutual Life Ins. Company v. Schaefer*, 94 U. S. 457, 462, that "the amount of insurable interest is the amount of the debt" does not accurately state the law on this subject.

Insurance Company v. Bailey, 13 Wall. 616, 619.

Insurance Company v. Mowry, 96 U. S. 544, 545.
Connecticut Mut. Life Ins. Co. v. Lucks, 108 U. S. 498.
Sides v. Knickerbocker Life Ins. Co., 16 Fed. 650.
Curtiss v. Aetna Life Ins. Co., 90 Calif. 245.
Amick v. Butler, 111 Indiana 578.
Rittler v. Smith, 70 Maryland 261; 16 Atl. 890.
Ulrich v. Reinoehl, 143 Pennsylvania 238.
Wheeland v. Atwood, 192 Pennsylvania 237.
37 *Corpus Juris* 396.

Now a $10,000 policy to secure an indebtedness of $5,686.08, when the interest to accrue on the indebtedness and the cost of maintaining the insurance is taken into consideration (in this case the annual premium was $394.20; R. 26) is not such a gross discrepancy as to show bad faith. On the contrary such a substantial indebtedness, in the light of the decisions on the subject, would appear to take the question of insurable interest out of the case.

In the decision of the Circuit Court of Appeals it is said:

> "The insurable interest of the Dazey State Bank was limited to an account reasonably adequate to cover Mosher's indebtedness to it and premiums which it would have to pay and interest" (R. 200).

But in what follows and in the conclusion of the opinion there is language from which respondent will contend, in case of a new trial, that petitioner's recovery is limited to the exact indebtedness at the time the policy was issued. The effect of this would be to make it impossible for the creditor to secure himself against future interest and future premiums. It is settled that if there is an insurable interest at the date of the policy, the cessation of that interest thereafter does not affect the right of recovery.

Conn. Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457.

Therefore the question of insurable interest must be determined as of the date of the policy. The creditor must

be allowed such a margin as will cover interest to accrue and premiums to be paid. This margin cannot be calculated according to any mathematical rule. Unless the discrepancy is so great as to show bad faith, the courts should not interfere. Certainly they should not look to subsequent events, such as payments of interest and premiums, as the Circuit Court of Appeals does in its decision, to determine whether the policy was disproportionate in amount when made.

The decision of the court below also seems in conflict with the North Dakota statutes dealing with this subject:

> "Every person has an insurable interest in the life and health * * * of any person under a legal obligation to him for the payment of money, or respecting property or services, of which death or illness might delay or prevent the performance * * *." Comp. L. 1913, Sec. 6628.
>
> "Unless the interest of a person insured is susceptible of exact pecuniary measurement, the measure of indemnity under a policy of insurance upon life or health is the sum fixed in the policy." *Id.*, Sec. 6631.

If there was any question of insurable interest under the court's view of the record, that question would be determined by the good faith or bad faith of the creditor, the Dazey State Bank. That question was for the jury.

Cooley, Briefs on Insurance, Vol. I, page 328.

The judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court should be affirmed.

Respectfully submitted,

ANDREAS UELAND,
SIGURD UELAND,
Attorneys for Petitioner,
Minneapolis, Minnesota.

FILED
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CHARLES ELMORE CROP
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 425

MIDLAND NATIONAL BANK OF MINNEAPOLIS,
Petitioner,

vs.

DAKOTA LIFE INSURANCE COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

JOHN B. HANTEN,
Attorney for Respondent,
Watertown, South Dakota.

(32,817)

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SUPREME COURT OF THE UNITED STATES

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

I.

The application should be denied because the petition for the writ of certiorari was not filed within the three months period prescribed by statute.

Prior to the amendment of the Judicial Code by the Act of February 13th, 1925, the holdings of this Court were to the effect that the three months period was tolled by petition for rehearing in the Circuit Court of Appeals.

Citizens Bank of Michigan City, Indiana, v. Opperman, 249 U. S. 448, 39 Sup. Ct. Rep. 330, 63 L. ed. 701.

Andrews v. Ry., 248 U. S. 272, 39 Sup. Ct. Rep. 101, 63 L. ed. 236.

Chicago Great Western R. R. v. Basham, 249 U. S. 164, 39 Sup. Ct. Rep. 213, 63 L. ed. 534.

These decisions are all based on the ground that certiorari, writ of error or appeal would not lie except in the case of final judgment, and that the judgment was not final until denial or other disposition of the petition for rehearing was had.

By the Act of February 13th, 1925, there is no provision made that the judgment or decree must be final. In fact, Chapter 9, Judicial Code, Title 28, Section 347, Amending Section 240 of the Code provides (subdivision a) that:

> "It shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether government or other litigant, to require by certiorari *either before or after a judgment or decree by such lower court that the cause be certified to the Supreme Court* * * *."

Furthermore, prior to the amendment of February 13th, 1925, there was no provision in the statutes for the extension of the three months period. The Act now provides, Section 350, Chapter 9, Title 28, Judicial Code, that:

> "For good cause shown the time for applying for a writ of certiorari may be extended not to exceed sixty days by a justice of the Supreme Court."

Judgment in this case was entered in the Circuit Court of Appeals April 12th, 1927 (pages 198-199, Record). Petition for rehearing was filed May 19th, 1927, or approximately five weeks thereafter, (pages 199-206, Record), and the order denying the petition was made May

26th, 1927 (Page 206, Record). The petition for certiorari was not filed herein until the 4th day of August, 1927, or more than three months after the entry of the judgment.

If because of the Amendment of February 13th, 1925, to the Judicial Code, it be no longer necessary that the judgment be final in order to apply for a writ of certiorari, then the three months period cannot be enlarged by the petition for rehearing. The sole method of enlarging the time would be by procuring an order from a justice of the Supreme Court extending the time not to exceed sixty days. The record shows no such order.

If to procure a writ of certiorari it is still necessary that the judgment be final, the application should be dismissed because the judgment is not final, for the judgment directs that the "cause be, and the same is hereby, remanded to the said District Court with directions for proceedings not inconsistent with the opinion of this Court." (Page 199, Record). The opinion (pages 193-198) shows that a new trial is contemplated. Such a judgment is not final.

LeCrone v. McAdoo, 253 U. S. 217, 40 Sup. Ct. Rep. 510, 64 L. ed. 869.

Chicago, etc. Ry. Co. v. Osborne, 146 U. S. 354, 13 Sup. Ct. Rep. 281, 36 L. ed. 1002.

Meagher v. Minnesota Thresher Mfg. Co., 145 U. S. 608, 12 Sup. Ct. Rep. 876, 36 L. ed. 834.

Rice v. Sanger, 144 U. S. 197, 12 Sup. Ct. Rep. 664, 36 L. ed. 403.

McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. Rep. 118, 35 L. ed. 893.

II.

Petitioner's First Point.

The first point made by petitioner on page 6 of its brief is evidently regarded as being pertinent to the first reason advanced by it for certiorari, viz: that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

The point upon which the Circuit Court of Appeals decided the cause was that the contract to a certain extent was a wagering policy. The respondent's answer to amended complaint (pages 39a-39i of the Record) was sufficient to tender this defense.

Error was assigned on the court's order in striking this defense (Pages 179-180, ff. 225-226, Record).

This stricken pleading together with the offer made in court were entirely sufficient, if permitted, to establish the defense.

A fair reading of the opinion of the Circuit Court of Appeals (pages 193-198, Record) shows that the Court considered this assignment of error and that the expression "tender of proof" as used in the Court's opinion does not merit the narrow construction placed thereon by petitioner.

Certiorari is not granted to review evidence and discuss specific facts.

United States v. Johnston, 268 U. S. 220, 45 Sup. Ct. Rep. 496, 69 L. ed. 925.

III.

Petitioner's Second and Third Points.

Petitioner's discussion of these two points fails to demonstrate that the Circuit Court has decided an important question of general law in a way probably untenable and in conflict with the weight of authority.

In its opinion the Circuit Court of Appeals cites the authorities of this and other courts which amply support its decision. These authorities are cited in subdivision 4 of the opinion at page 197 of the Record.

It is in subdivision 4 of the opinion that the Court determines that the policy to a certain extent was void because it was a wagering contract and the incontestable clause did not bar that defense.

In its petition for rehearing in the Circuit Court of Appeals (page 205, Record), petitioner states:

> "*We do not here question the soundness of the legal principles enunciated by the Court in subdivision numbered 4 of its decision, but submit that these principles have no application on this writ of error.*"

Nothing has occurred since this to impair the "soundness of the legal principles enunciated by the Court."

Respectfully submitted.

JOHN B. HANTEN,
Attorney for Respondent,
Watertown, South Dakota.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 425

MIDLAND NATIONAL BANK OF MINNEAPOLIS,
PETITIONER,

vs.

DAKOTA LIFE INSURANCE COMPANY,
RESPONDENT.

RESPONDENT'S BRIEF.

Statement.

The statements made by petitioner relating to the proceedings in the United States District Court for Minnesota are sufficiently stated.

Pleading.

The contents of the pleadings shown need supplemental statement to show to the court the questions of fact involved in this action.

1. P. XX. The respondent's answer to the amended complaint of the petitioner did allege the conspiracy of Jacobson, Mosher and Doctor Kellogg, to obtain the policy, and to conceal, omit and fail to disclose that Mosher, the insured, was in the final stages of pulmonary tuberculosis (R., 40).

2. P. XXI. Respondent did believe and rely upon the application to issue and did issue to Mosher, the insured, its policy on or about May 14, 1920 (R., 40).

3. P. XXII. The term premium was $108.50; the annual premium required to be paid on November 28, 1920, was $394.20.

4. P. XXIII. Dazey State Bank of Dazey, North Dakota, paid the term premium and all other premiums thereafter paid (R., 40).

5. The application, attached to the policy and made an exhibit of the petitioner's amended complaint, reads: "8. Incontestability. This policy constitutes the entire contract between the parties and shall be incontestible from ITS DATE, except for nonpayment of premiums and, EXCEPT AS OTHERWISE PROVIDED IN THIS POLICY (R., 28). All statements made by the insured shall, IN THE ABSENCE OF FRAUD, be deemed representations and not warranties and no such statement shall void this policy unless it is contained in written application and the copy of such application shall be endorsed upon or attached to this policy when issued (R., 29). I HEREBY AGREE: that this application and the policy hereby applied for, taken together, shall constitute the

entire contract between the parties hereto, AND I HEREBY DECLARE that the contract shall not take effect until the first premium has been paid during my GOOD HEALTH. Oscar Mosher, Applicant. Witness, J. E. Jacobson, Agent" (R., 30).

6. P. XXIX. That in furtherance of said conspiracy, said Mosher, July 17, 1920, did assign said policy to Dazey State Bank of Dazey, North Dakota; that J. E. Jacobson was the president of said bank; that the policy was transmitted to Jacobson and was in the possession of the Dazey State Bank, and H. L. Jacobson, the son, was cashier, and the affairs of the bank were managed by J. E. Jacobson (R., 42).

7. P. XXX. The assignment is given to secure the payment of several promissory notes (R., 42).

8. P. XXXI. The policy was assigned October 10, 1921, by Mosher and Dazey State Bank without authority and without transfer of the notes to Jacobson (R., 42).

9. P. XXXII. There was no debt due by Mosher to J. E. Jacobson (R., 43).

10. P. XXVI. Oscar Mosher died from the disease of pulmonary tuberculosis September 10, 1923, lingering from before being insured to his death from the same disease (R., 41).

11. (Fol. 35) (Form of all assignments, except date): "The foregoing assignment is hereby approved, subject, however, to all the terms and conditions set forth

in said policy. Dated the 2d day of March, 1923. Dakota Life Insurance Company, by J. J. Bell, Actuary." (This assignment was to the Petitioner.) (R., 34.)

Respondent's amended answer to the amended complaint states:

12. P. I. That the policy was assigned by Mosher to Jacobson, as collateral security for debt owing by Mosher to Dazey State Bank (R., 56).

13. P. III. That the amount of the indebtedness was $5,686.08, evidenced by promissory notes executed to said bank by said Oscar Mosher.

14. P. VI. That on January 13, 1923, said debt of Oscar Mosher and Sophia Mosher to said Dazey State Bank had been reduced to the amount of $4,193.84, and no more, and there was no debt due by Mosher to J. E. Jacobson (R., 57).

15. P. VII. States in detail the fraudulent misrepresentation made by one Neal, as agent for petitioner, to Oscar Mosher and Sophia Mosher, his wife, January 13, 1923, while getting the notes for the debt due by the Moshers to the Dazey State Bank renewed and time extended, and in procuring the two $5,000 notes to J. E. Jacobson from the Moshers (R., 57-58).

16. P. X. States that Mosher and J. E. Jacobson made assignment of the policy to petitioner to secure the debt of the Moshers to the Dazey State Bank and for no other purpose (R., 58-59).

17. P. XI. That on June 19, 1923, an action was brought by respondent as plaintiff, in the District

Court of North Dakota, against Oscar Mosher, Dazey State Bank, Harris St. John, as receiver of Dazey State Bank, J. E. Jacobson, and Midland National Bank of Minneapolis, as defendants, to cancel the policy on the ground of fraud (R., 59).

18. P. XXII. That summons and complaint were served on petitioner, and petitioner had full notice of said action, but appeared specially and moved to set aside the said service, claiming the court was without jurisdiction as to it, and it was set aside (R., 59).

19. P. XXIII. Mosher died intestate and resided in Barnes County, North Dakota, and Sophia Mosher, his widow, was appointed administratrix of his estate (R., 59).

20. P. XV. That judgment was given May 12, 1924, by the District Court of North Dakota in favor of Dakota Life Insurance Company and against Sophia Mosher, as administratrix of the estate of Oscar Mosher, decedent, adjudging that policy issued by respondent to Oscar Mosher in the sum of $10,000 be cancelled, annulled and void, and of no effect from beginning (R., 60).

21. P. XVI. That respondent approved the said assignment from Jacobson to petitioner without knowledge of the facts, methods and means whereby petitioner procured said assignment, and if respondent had had knowledge it would have refused to approve said assignment (R., 60).

22. P. XVII. That all of the premiums on the policy were paid by Dazey State Bank (R., 60).

23. P. XVIII. That petitioner has no title or interest in or to said policy by reason of the facts alleged in the answer (R., 60).

24. P. XIV. Respondent denies every allegation contained in paragraph 5 of the amended complaint relating to the assignment by Mosher and Jacobson February 26, 1923, to petitioner, and denies the allegations contained in the 16th paragraph of the amended complaint relating to the performance of all conditions by Mosher or petitioner as required in said policy, and respondent prays that petitioner take nothing in this action (R., 60-61).

25. Paragraph 5 of the amended complaint of petitioner reads: "The company will not assume the responsibility for the validity of an assignment" (R., 28).

The petitioner in its reply to respondent's amended answer to the amended complaint:

26. Par. 1. Admits that J. E. Jacobson on October 10, 1921, was the president of Dazey State Bank; that Oscar Mosher and Sophia Mosher, January 13, 1923, signed two notes for $5,000 each, to J. E. Jacobson; admits that June 19, 1923, an action was commenced by respondent against petitioner in the District Court of North Dakota (R., 59), and admits death of Oscar Mosher and appointment of Sophia Mosher as administratrix of the estate of Oscar Mosher, decedent (R., 62).

27. Par. 5. That petitioner on June 28, 1923, bid in, at public auction, at sale, the two $5,000 notes (R., 63).

28. Par. 6. That petitioner accepted said notes, insurance policy and assignments, and thereafter lent money to said Jacobson and extended credit to said Jacobson and said Dazey State Bank (R., 63-64).

29. Par. 7. Petitioner alleges the fact to be that Sophia Mosher and estate of Oscar Mosher ARE WHOLLY INSOLVENT (R., 64).

30. Wilbur F. Booth, United States circuit judge, acting by assignment, with reference to respondent's amended answer to the amended complaint of petitioner, on application for leave to file respondent's amended answer to the amended complaint of the petitioner, made order granting the motion April 28, 1925 (R., 61), and made the following

"Memorandum.

"The facts alleged in the proposed amendment to the answer to the amended complaint, in my judgment, have a bearing upon the questions whether plaintiff (petitioner) HAS ANY OWNERSHIP in the policy in question, and if it has, whether the ownership is a general or limited one.

"In these respects at least, the allegations of the proposed amended — differ from the allegations of the former answer, which were stricken out on motion.

"Wilbur F. Booth, United States Circuit Judge, Action by Assignment" (R., 62).

31. The following paragraphs of respondent's original answer to the petitioner's amended complaint were,

on motion by petitioner, filed March 6, 1924, ordered stricken, namely: Paragraphs 4 to 6 inclusive, 9 to 11 inclusive, 13 to 20 inclusive, 25 to 28 inclusive, 42 to 45 inclusive, and the words "in furtherance of said conspiracy" in paragraphs 12 and 29, and the words "when and while said Mosher was in good health on payment of the first premium by him" in paragraph 24, and paragraphs 8, 23, 32, 34, 35 and 37 to 51 inclusive, and all that part of paragraph 31 after the words "marked Exhibit B" in the fifth line of said paragraph, and that part of paragraph 36 consisting of the words "but it did so without knowledge of the facts hereinbefore alleged" (R., 50-51).

32. That if it had known at the time of the existence of said things hereinbefore set forth, it would have refused to have approved any of said assignments. Par. XLI (R., 45).

33. Assignment of Error, filed May 3, 1926, in the United States District Court, made by the respondent and plaintiff in error in said district court and in connection with its petition for writ of error, did specify as error, striking parts of the answer, and upon which assignment of error it relies to reverse the judgment rendered against it.

I. II. That the court erred in making its order, filed herein on October 16, 1924, granting plaintiff's (petitioner's) motion to strike all the paragraphs stricken as shown by the order hereinbefore stated (R., 188).

Facts shown by pleadings, oral evidence, written documents, and offer to show by the witnesses sepa-

rately called for respondent, Sophia Mosher, Maxwell Ladbury and J. J. Bell.

1. Oscar Mosher, the insured, died September 10, 1923 (R., 25; Par. 13).

2. The estate of Oscar Mosher and Sophia Mosher, the widow, were wholly insolvent (R., 64; Par. 7, petitioner's reply to amended answer).

3. Dazey State Bank was closed and placed in the receiver's hands February 26, 1923 (R., 95; Test. Mattson).

4. The policy was assigned as security for the payment of the two $5,000 notes February 26, 1923, acknowledged February 27, 1923, before Rudolph C. Jacobson, notary public, and son of J. E. Jacobson, and assignment was approved at Watertown, South Dakota, March 2, 1923 (R., 33-34).

5. The two $5,000 notes were obtained January 13, 1923, from Oscar Mosher and Sophia Mosher to J. E. Jacobson and endorsed by payee and transmitted to petitioner and received March 2, 1923 (R., 79-81).

6. Edgar L. Mattson, witness for petitioner, on direct examination, testified being vice president of petitioner bank (R., 79).

The notes were transmitted by mail (R., 81).

J. E. Jacobson was president of Dazey State Bank (R., 86).

Foreclosure sale of pledged notes was made June 23, 1923 (R., 93).

No advance was made by petitioner bank on the two $5,000 notes (R., 93-94).

Q. Yes, but I say, at the time these two notes and the policy was assigned to your bank, was there any separate collateral agreement covering those, executed by you and Mr. Jacobson?

A. There was nothing additional taken at that time (R., 95).

7. Edgar L. Mattson, witness for petitioner, on cross-examination, testified:

Primarily, Mr. Sharpe, our assistant cashier, who had under him the principal man, Mr. C. B. Neal, looked after the collections of the collateral notes held for the payment of the Dazey State Bank and J. E. Jacobson obligations in the winter of 1922-1923 (R., 102).

A note for $2,010.86 as collateral came to the bank (R., 103).

Do not know when Exhibit "C" (assignment of policy) was received at the bank (R., 104).

C. B. Neal was acting as the field collector for the bank under the supervision of the officers of the bank (R., 105).

8. Clarence B. Neal, witness for petitioner, testified on direct examination:

I and Rudolph Jacobson were at the home of Oscar Mosher and Sophia Mosher, January 13, 1923.

I signed as a witness the original, at the time it was signed, of Exhibit 1, chattel mortgage securing the pay-

ment of a note of $2,010.86 to Dazey State Bank, as collateral security for the Midland National Bank.

Also signed as a witness the original chattel mortgage given by Sophia Mosher of Exhibit 2, to secure the payment of $1,646.49, on January 13, 1923.

Also signed as witness the original mortgage, shown by Exhibit 3, to the signature of Sophia Mosher, January 13, 1923, for $1,500.

The three notes were signed at that time by Oscar Mosher and Sophia Mosher with defendant's Exhibits 1, 2 and 3, made to secure the payment thereof.

No papers were written at the home; they were simply signed.

The papers were written up before by Jacobson and were given to me by Mr. Jacobson.

I was in the employ of the Midland National Bank for some time prior to that time.

I was operating and obtained direction for my work from J. H. Sharpe, assistant cashier, before January 13, 1923, for about sixty days.

The note of $2,010.86 was the only note that I obtained for Midland National Bank (R., 106 to 108).

9. Respondent offered in evidence Exhibit 4 (Findings, conclusions and judgment in North Dakota action canceling policy).

The offer was objected to as immaterial and irrelevant, and was sustained. Exception taken (R., 109).

The judgment was certified to and authenticated by the clerk, judge and clerk, October 6, 1925 (R., 175-176).

Findings of fact and conclusions of law recite that action was brought by Dakota Life Insurance Company *vs.* Oscar Mosher, Dazey State Bank, a corporation; L. E. Baird, as receiver of Dazey State Bank; J. E. Jacobson, Midland National Bank of Minneapolis, Minnesota, and Sophia Mosher, as administratrix of the estate of Oscar Mosher, defendants (R., 177).

That service was made on Oscar Mosher, who did not appear and was in default, and died later, and that Sophia Mosher was substituted as administratrix of the estate of Oscar Mosher.

That the said action was tried on the issues, by hearing and considering testimony submitted by depositions of John B. Hanten, Sophia Mosher, Edgar Ladbury and Doctor J. L. Livingston, and on Exhibits #1 to #12, inclusive (R., 177-178).

Par. V. That policy was sent June 10, 1920, to plaintiff's local agent, J. E. Jacobson, at Dazey, North Dakota, for delivery on payment of premium of $108.50 (R., 179).

Par. VI. That Oscar Mosher made no payment of any premium and the possession remained in J. E. Jacobson until assignments were made, and Oscar Mosher did not know by whom the premium payments were made on the said policy (R., 179).

Par. VII. That at the time of the issue of the policy and before making the said application for it, Oscar Mosher, and ever since and thereafter, was afflicted in an advanced state with tuberculosis of the lungs and was not in good health and knew his condition of health

was not good at the time said application was made and transmitted (R., 179-180).

Par. VII½. That the policy was canceled and nullified by mutual agreement of the parties thereto; that Oscar Mosher later died from the disease of consumption (R., 180).

Par. VIII. That the insurer (plaintiff company) had its first knowledge and information of this condition of the health of Oscar Mosher before, at the time and thereafter, as to the issue of said policy, on May 19, 1923 (R., 180).

Par. IX. Premium payments were made to May 21, 1923, of $1,102.20 (R., 181).

Par. X. That plaintiff, the insurer, rescinded, June 1, 1923, and this rescission was consented to and the policy canceled, on condition that the amount of the premiums paid on the said policy be offered and returned to the party making the payments of the premium (R., 179-181).

Conclusions of the court:

Par. II, are that plaintiff pay into court $1,102.20 and interest (R., 181).

Par. III, plaintiff have judgment in its favor and against Oscar Mosher and Sophia Mosher, as administratrix, adjudging and decreeing policy numbered 18260, for the amount of $10,000, canceled and void from beginning, April 8, 1924 (R., 182).

Judgment was dated May 12, 1924, and ordered and adjudged and decreed that policy numbered 18260, is-

sued by Dakota Life Insurance Company upon the life of Oscar Mosher, in the amount of $10,000, be canceled, annulled and adjudged to be void and of no effect from beginning (R., 182 to 184).

10. Exhibit 5, note for $1,500, dated January 13, 1923, signed by Oscar Mosher and Sophia Mosher to Dazey State Bank, written across the face of the note, "Collateral to note $1,093.75, 9-1-23, $200.00 demand," endorsed Dazey State Bank, by J. E. Jacobson, president. Pay to the order of Ed. Ladbury without recourse. First National Bank, Fargo, North Dakota, by E. V. Bassett" (R., 184).

11. Exhibit 6, showing letterhead of Dazey State Bank, dated January 20, 1923, addressed, Mr. Oscar Mosher, Dazey, North Dakota. Dear Sir: I am sending you a note for $682.98, which kindly sign. Also please have your wife sign it with you. This was the difference in settling with the Dazey State Bank on the former notes of yours, and this will make the correct amount in order to balance the books of the Dazey State Bank. Will you kindly sign this note, so that we can get it back by return mail? Yours truly (signed), J. E. Jacobson, R. E. J. (Written on side: $682.98, Jan. 13-23.) (R., 185.)

12. Defendant's Exhibit 7, heading, Midland National Bank, dated March 5, 1923, addressed, Mr. Oscar Mosher, Dazey, North Dakota. Dear Sir: *Re* Note signed by yourself and Sophia Mosher. We are advised that the Dazey State Bank, Dazey, North Dakota, has closed, and this will inform you that we are

the holders of your note of $2,010.86, dated 1-13-23, and due 10-15-23, as security to the indebtedness of said bank, asking for payment. Please get in touch with our agent, Mr. C. B. Neal, who is now at Dazey, at once and let him know just what your intentions are. Yours very truly (signed), J. H. Sharpe, assistant cashier (R., 185-186).

13. Defendant's Exhibit 1 shows chattel mortgage made by Sophia Mosher to Dazey State Bank, securing the payment of $2,010.86 on note dated January 13, 1923, due October 1, 1923, witnessed by C. B. Neal and R. C. Jacobson, January 13, 1923 (R., 163-165).

14. Defendant's Exhibit 2 shows chattel mortgage by Sophia Mosher, securing the payment of $1,646.49 on note dated January 13, 1923, due November 1, 1923 to J. E. Jacobson, witnessed by C. B. Neal and R. C. Jacobson (R., 167-169).

15. Defendant's Exhibit 3 shows mortgage made by Sophia Mosher, securing the payment of note for $1,500 to Dazey State Bank, witnessed by C. B. Neal and R. C. Jacobson (R., 171-173).

16. Petitioner's Exhibit A and notice of sale shows sale, June 23, 1923 (R., 159), and in Exhibit A the notes of Oscar Mosher and Sophia Mosher, dated January 13, 1923, each for $5,000, and the policy in suit, are mentioned, and "The Dakota Life Insurance Company has served notice demanding the cancellation of the above policy, on the ground that it was obtained through misrepresentation" (R., 162 bottom; 163, top).

17. Respondent had Sophia Mosher sworn, and the witness testified:

I reside on a farm near Dazey, North Dakota.

Have lived there 26 years.

I am the widow of Oscar Mosher.

I am acquainted with C. B. Neal, Rudolph Jacobson and J. E. Jacobson, who came to our place on the farm January 13, 1923, about nine or ten A. M., and stayed a half or three-quarters of an hour. My husband was up at the time. No papers were written at our home. The papers were signed that day by my husband and myself. I was present when the papers were signed by Mr. Mosher and myself (R., 110).

18. The petitioner objected to the witness testifying about the transaction, stating that there was a question if it had any bearing upon the case. The respondent asked to be permitted to offer orally in court the facts which the respondent would establish by this witness, and the court granted permission to make said offer (R., 114).

19. We offer to show by the witness on the stand, that at the time the notes were signed, there was a reference made to renewing the paper for the coming year on the obligation that existed on the part of Oscar Mosher and Sophia Mosher to the Dazey State Bank and to J. E. Jacobson (R., 114-115).

20. Defendant's Exhibit 5 was marked for identification, being note for $1,500, dated January 13, 1923, payable to the Dazey State Bank, signed by Oscar Mosher

and Sophia Mosher; that it was afterwards endorsed by the Dazey State Bank by J. E. Jacobson, president, and again endorsed by the First National Bank, Fargo, North Dakota, pay to the order of Ed. Ladbury, without recourse, and that said note was settled for and paid by this witness; that the chattel mortgage was made to secure said note on the same date and witnessed by C. B. Neal and R. C. Jacobson.

At the same time there was a note executed for $2,010.86 to the Dazey State Bank, signed by Oscar Mosher and Sophia Mosher, endorsed by the Dazey State Bank, and a chattel mortgage made to secure the payment on the same date, witnessed by C. B. Neal and R. C. Jacobson.

Also, at the same time, there was a note made for $1,646.49, signed by Oscar Mosher and Sophia Mosher, payable to J. E. Jacobson at Dazey, North Dakota, secured by a mortgage (R., 115).

Respondent also offered to show by this witness that there was a note signed in the amount of $682.98 to Dazey State Bank by Oscar Mosher and Sophia Mosher, defendant's Exhibit 6, that the same was transmitted by letter, mailed from the Dazey State Bank, and received through the United States mail, and with that note there was a letter, being defendant's Exhibit 6; that this Exhibit 6 came into her possession after her husband's death as administratrix of his estate, and was found in their home on the farm out of Dazey, North Dakota; that this note was signed by Oscar Mosher and Sophia Mosher and returned to the Dazey State Bank, and that demand for payment was

afterward made on Sophia Mosher. Said note is not paid and is in the possession of the receiver of closed banks of North Dakota (R., 116-top 117).

Respondent also offered to show by this witness, defendant's Exhibit 7, letter demanding payment of the $2,010.86 note, which was found among the papers in her home after the death of her husband.

Respondent also offered to show by this witness that at that time there was only one statement made when the notes were signed, and that was that they were the notes to secure the renewal of the notes for the amount that was due to the Dazey State Bank and J. E. Jacobson at that time, and that the papers were laid on the table for signing. That the two $5,000 notes had revenue stamps on, canceled May 22, 1922 (R., 117).

That the notes lying on the table were then signed; that there was no statement made of any $5,000 notes to be signed, and there was nothing stated as to the amount of $10,000 being turned over, or that there was any amount of that kind due from Oscar Mosher or from Sophia Mosher; that the two $5,000 notes were not called to their attention, and that Oscar Mosher and Sophia Mosher did not receive any consideration for the said notes (R., 118).

Respondent further offered to show by this witness that there had been no prior debt of Oscar Mosher or Sophia Mosher for which these two $5,000 notes were made; that all that the Dazey State Bank and J. E. Jacobson had against them at that time was about $5,500; that their property consisted of machinery, horses and cattle, and that the total value of that prop-

erty was far less than the amount of $5,500 that they owed to the Dazey State Bank and J. E. Jacobson; besides that, they were indebted to the First National Bank of Valley City to the amount of around $3,500; that they had a farm, and this was foreclosed by J. E. Jacobson February 13, 1915, and the time of redemption expired February 13, 1916, and the farm was leased to them by J. E. Jacobson, and that they paid rent every year for the said land (R., 118-119).

Par. XXIII. Defendant's Exhibit 10 was marked for identification, being authenticated bill or statement of notes relating to Dazey State Bank account against Oscar Mosher and Sophia Mosher, and showing all notes paid except three, one for $2,010.86, one for $1,500 (later paid, shown by Exhibit 5, R., 184), and one for $682.98 (R., 119).

Par. XXIV. Respondent offered to show by J. J. Bell, witness for it, that he was actuary of the company; that he approved this assignment; that he was not aware of any of the offenses that existed, or might exist relating to the said policy for $10,000, and was not aware of the two notes aggregating $10,000, made without consideration, or were executed without the knowledge of the signers, or that the signing of the same had been procured by a trick or deception; that he believed at the time that the notes were genuine and that he would not have approved the said assignments if he had known the facts relating to the making of the said notes (R., 119-120).

Par. XXV. Respondent offered to show by the witness, Maxwell Ladbury, that he had a conversation with C. B. Neal, agent of the petitioner, and the party was present at the time the notes were executed on January 13, 1923, being two $5,000 notes and the three other notes; that this conversation between the witness and C. B. Neal took place in the hotel at Dazey, North Dakota, during the fall of 1923, and this was the only conversation he had with him about the transaction at the farm home, January 13, 1923; and C. B. Neal stated that these papers were all prepared and taken out to the farm; that they went there to get them signed; that the papers were signed and they left; that before they went out there he had the opinion that these two $5,000 notes were of no account and that he doubted that they would be signed, but after he got there the notes were signed; they were taken up and brought to Dazey, North Dakota (R., 120).

Petitioner objected to the offer made by the respondent, on the ground that said testimony was immaterial and irrelevant matter and that it did not sustain the contention of fraud. The court sustained the objection (R., 121-122).

Par. XXVI. Respondent asked to strike from the evidence Exhibits D and E, being the two $5,000 notes, on the ground that the same were not admissible as evidence, no stamp tax having been affixed thereto; that stamp tax affixed appear to have been canceled May 22, 1922; that the notes are the notes for which the assignment was secured, and that the evidence be stricken

from the evidence. The motion was denied by the court (R., 122).

Respondent also asked the court to hold that the evidence is not sufficient, considering the evidence that has been offered and admitted for the respondent; that there was not any consideration for the making of the said notes to the maker; that the bank did not advance any payments, time of payment was not extended, and that the bank did not part with any consideration in obtaining the said assignment, on which request the court did not rule (R., 122).

ARGUMENT.

Reviewing briefly the facts presented, and inferring therefrom, I call your attention to the existing parties and their actions.

Oscar Mosher, the insured, in May, 1920, was a tenant farmer on a farm some distance from Dazey, North Dakota, and was sick from pulmonary tuberculosis. His family consisted of his wife, Sophia, and children. He did own horses, cattle, machinery, feed and household furnishings of the value of about $3,500. He did owe Dazey State Bank $5,600, and his personal property was mortgaged for payment of his debts. He did owe a bank at Valley City about $3,500. He was insolvent and his estate was insolvent, and his wife, Sophia, was insolvent.

J. E. Jacobson in 1920 (now dead) was a banker at Dazey, North Dakota, president of Dazey State Bank, owned and managed by the Jacobson family. Jacobson was local agent for respondent,

Mosher's disease showed that he might die from its inevitable effect within a short time. The idea to insure Mosher for $10,000 and to get the policy and have it assigned to pay the debt of Mosher to the bank suggested itself readily, and the application was made, and issue of the policy was obtained from the respondent. The first premium payment was for a short term. The annual premium was to be paid in November, 1920. The premium payments were made by the bank. Mosher paid no premiums. The policy was transmitted to Jacobson; it was assigned to the bank forthwith; it was kept in the bank. The first annual premium payment was extended until the fall of 1921, and so was the second annual premium payment. There was one premium payment not paid at the time of the death of the insured, September 10, 1923; its payment had also been extended. There was paid in all about $1,100 in premiums.

Mosher did not die in 1920 or 1921. Financial conditions since 1920 had perceptibly grown worse in North Dakota. Jacobson, in the fall of 1921, conceived the idea to have the policy assigned to himself. His wish was a command to Mosher. Mosher had no interest in the policy. Mosher was the necessary subject for use. During the fall of 1922 conditions were ready for a financial collapse in the personal affairs of Jacobson and Dazey State Bank. Jacobson was in dire financial distress, and he conceived the necessity, or had been prompted, of letting loose of his hold on the policy, and to frame up the scheme to get two $5,000 notes and to have the policy assigned to one of his creditors. Past

experience in getting Mosher to sign papers convinced him that it was feasible. It was done. Renewal notes had to be made of the debts due the bank, also renewal chattel mortgages; the papers were all made up, and C. B. Neal, agent and representative of the petitioner, and Rudolph C. Jacobson, his son, were sent out to the farm home to get the notes and chattel mortgages signed by Oscar Mosher and Sophia Mosher. The parties signing were told that the notes had to be renewed, and the papers were there for them to sign, and that was all that they had to do, and they did it. It meant another year of delay in paying, and in bending their backs to the task of paying for the wife and children. There was no consideration, no promise made, and the two $5,000 notes were but scraps of paper.

C. B. Neal or Jacobson, who was with him, gathered up the papers after they were signed and brought them back to Dazey State Bank. C. B. Neal, in a forgetful moment, told Maxwell Ladbury during the fall of 1923 about the two $5,000 notes; that he took them out; that they were worthless; that he did not expect to have them signed; that they were signed, to his surprise. The policy was not assigned at that time. The bank closed its doors and was insolvent, placed in charge of a receiver February 26, 1923. The policy was taken from the possession of the bank February 26, 1923, the assignment was dated February 26, 1923; its execution was acknowledged February 27, 1923, by Rudolph Jacobson, a son, as notary public. The two $5,000 notes reached the petitioner bank at Minneapolis, Minnesota, March 2, 1923. The assignment of the

policy was approved at Watertown, South Dakota, March 2, 1923. This approval was subject to the terms and conditions of the policy and without responsibility as to the validity of the assignment. The policy and the assignment were transmitted after March 2, 1923, to someone, but it was finally located in the petitioner bank. This condition was brought to the notice of the respondent in May, 1923. Investigation was made, notice of rescission was served on the insured and the petitioner bank, and offering premium payment return. It was received by the petitioner. Oscar Mosher, then on his deathbed, agreed to the rescission and cancellation of the policy, on condition that the premium payments should be turned over to the party who made such payments. This was about June 1, 1923.

Immediately thereafter petitioner bank took steps to foreclose the pledged property. The sale was made June 28, 1923, and a schedule made of the articles sold, describing the notes and the policy as part of the security sold, stating that respondent had given notice to petitioner of misrepresentation made in procuring the policy and of rescission of the contract and for cancellation of the same. Action was brought some time in June, 1923, against Mosher, receiver of the Dazey State Bank, J. E. Jacobson and petitioner; service was made on a person connected with the petitioner bank as agent or representative, before the sale of the pledged notes; the petitioner did appear specially to question the validity of the service, and the service was set aside. The action was prosecuted to judgment; evidence was submitted orally and by exhibits, and the

policy contract was declared rescinded and canceled and void from beginning, and the judgment provided for return of premium payments, to be deposited with the clerk of courts.

These recitals are made from the facts as shown in the respondent's brief.

It seems unnecessary to comment further that an offer was made at the time of the trial to show, by the witness, J. J. Bell, who approved the assignment, that he did not know the conditions under which the policy issue and assignment were made and presented, and that he would not have approved the assignment if he had known the truth of the conditions.

The district court, in its memorandum, states: "The facts alleged in the proposed amendment to the answer to the amended complaint, in my judgment, have a bearing upon the questions whether plaintiff has any ownership in the policy in question, and if it has, whether the ownership is a general or limited one."

The circuit court of appeals stated: "So we conclude on the facts stated that the policy was a good and valid contract to the extent of Mosher's indebtedness to the Dazey State Bank on May 14, 1920, and that the court erred in excluding the tendered proof."

The record of facts shows the taking of property, in the shape of a policy by Jacobson from the respondent by fraud and deceit, and it shows the obtaining of the two $5,000 notes by fraud and without consideration. Both acts are felonious and against the provisions of law in North Dakota and in the United States.

The petitioner has possession of the policy and the assignment, obtained by unlawful acts. Possession of the policy was acquired sometime after March 2, 1923; the possession of the notes mentioned in the assignment came to the petitioner bank March 2, 1923; the petitioner had notice of the rescission of the policy before the foreclosure of the pledged property was made. The petitioner had service of summons and complaint made on it for the cancellation of the policy and for the return of premium payments. The petitioner contends this is not an issue on a wager policy, but it was a wager, taken on an illegal claim, with the chance for petitioner to win. The petitioner had no claim against Mosher, except the debt owed by Mosher to the Dazey State Bank. That claim was $2,010.86. There was another unpaid note in the amount of $682.98 in the Dazey State Bank, signed by Mosher and his wife, when the bank closed, and this passed to the bank department in charge of closed banks in North Dakota, which is shown as Exhibit 6 (R., 185). This exhibit speaks volumes relating to the making of the notes at the farm home of Oscar Mosher and Sophia Mosher, out of Dazey, North Dakota, January 13, 1923.

The petitioner wants payment from Sophia Mosher of the note for $2,010.86, made January 13, 1923, according to letter dated March 5, 1923, signed by J. H. Sharpe, assistant cashier, and "to get in touch with our agent, C. B. Neal, who is now in Dazey." (See Defendant's Exhibit 7; R., 185.)

An insurance company cannot pay a claim of this kind without stultifying itself, and it owes it to society

and to the policyholders and to the stockholders of the company to throw the light upon the transaction as it is and to maintain the principles of honesty and for the triumph of right.

Brief on Issues of Law.

The main question, and only one, on which the petitioner relies for a reversal of the opinion of the Circuit Court of Appeals of the Eighth Circuit relates to "the extent of insurer's liability on the proof and the tendered and rejected proof." The opinion was delivered by Circuit Judge Lewis; the decision was filed April 12, 1927, reversing the judgment of the district court and remanding the action for trial. The decision is based upon the condition at its inception, that the Dazey State Bank had an insurable interest as creditor of the insured, otherwise it would have been a wagering contract and void, because against public policy, citing: Crotty *vs.* Union Mutual Insurance Co., 144 U. S., 621; 36 L. Ed., 566; N. Y. Life Ins. Co. *vs.* Armstrong, 117 U. S., 591; 29 L. Ed., 997; Warnock *vs.* Davis, 104 U. S., —; 26 L. Ed., 924; Conn. Mutual Life Ins. Co. *vs.* Schaefer, 94 U. S., 457; 24 L. Ed., 251; Gordon *vs.* Ware Nat'l Bank, 132 Fed., 444. Many State courts have passed on this condition of an insurable interest, and the contract being a wager and void on that account. The offer of proof in this case warrants the statement that the claim of the petitioner is one obtained by trick and deception in the execution of the two $5,000 notes, without consideration, nearly three years after the policy was issued, and that there

was no obligation on the part of the insured, and that by trick and deception it was the result of the action of the agent and representative of the petitioner, and that the petitioner cannot hold the claim against the respondent under that state of facts, because it would be a denial of justice to get the results of an illegal act on a wager and without having an interest in the life of the insured.

In the action of Thomas *vs.* Conn. Mutual Life Ins. Co. (Kans.), decided July 9, 1927, 257 Pac., 727, on the facts stated: of the issue of a valid 20-payment life insurance policy for $5,000 to Thomas, payable to his estate and assigning the policy to one Hall, as a matter of speculation on the part of Hall, who had no insurable interest in Thomas' life, and as part of the transaction, Thomas executed and delivered to Hall a promissory note for $5,000, payable on demand after Thomas' death, and the note was given without consideration, and six years later Hall executed and delivered to Thomas an agreement to rely entirely on the security of the policy for payment, and Thomas paid the initial premium and Hall paid all subsequent premiums; and dividends having accrued after the policy was paid up in the sum of $2,000, and Thomas sued the insurance company for the dividends; held recovery should be denied on the ground of public policy. In its opinion, the court quotes: "He (Thomas) proved that Hall had no insurable interest in his life; that the note was without consideration, and that he gave the note and assigned the policy to Hall to promote Hall's speculative enterprise. This being true, the assignment was inef-

fectual to accomplish the purpose for which it was executed." Further quoting from the opinion: "Thomas seeks to reap the benefits flowing from Hall's conduct, instigated by Thomas' conduct in executing the invalid assignment. If the assignment were merely illegal in the sense that it lacks authority and support of the law, it might be disregarded, and Thomas might claim the same benefits he would be entitled to if it had not been executed. But such is not the case. The transaction, which included execution of the sham note, execution of the assignment and delivery of the note, and assignment of the policy to Hall, was obnoxious to the public policy of the State. Hall was simply speculating on the length of Thomas' life. At the beginning of the transaction Hall had no interest in the continuation of Thomas' life, and at the conclusion he had a large pecuniary interest in Thomas' early death. Such transactions are regarded as having a mischievous tendency detrimental to our social welfare, apart from simple lack of legal recognition, and the settled opinion of this court is that an assignor and assignee incur equal odium. While the guilty assignee gets nothing, the assignor will not be aided in attempting to avoid the assignment, speculative consequences of his vicious conduct and harvest where he planted no seed, the law leaves him where it finds him; citing: Life Ins. Co. *vs.* McCrum (1887), 36 Kans., 146; 12 Pac., 517; 59 Am. Rep., 537; Ins. Co. *vs.* Elison (1905), 72 Kans., 199; 83 Pac., 410.

The judgment of the district court in favor of Thomas and against the insurance company is reversed

and the cause is remanded, with direction to return judgment for the company. Hall having died and his estate passed the policy to three of his children as residuary legatees, were made parties to the action and were served by publication, did not appear or plead.

In the case before the court the petitioner had been served with the summons and complaint in this action, the petitioner appeared specially to set aside the service and the motion was granted. This was a chose in action, a North Dakota contract; the action was pleaded, involving the cancellation of the contract on its rescission by mutual consent, and the respondent contends that that service was effective and sufficient on the petitioner, and the petitioner should have entered appearance and should have plead its defense, and having failed to do so on the notice acquired by service of summons and complaint, it should be held bound by the decision rendered in the District Court of North Dakota on a North Dakota contract. In that respect the opinion rendered by the circuit court of appeals, quoting from that decision, "That court found that the policy was canceled by mutual agreement of Mosher and the insurance company."

The claim made by petitioner that the indebtedness of the insured to the Dazey State Bank, at the inception of the policy, or the assignment of the policy to that bank, is not contained in the substituted pleading, is not correct; it is referred to in the proposed amended answer to the amended complaint in paragraphs I, III, VI and VII (R., 56-57), and is *admittedly* contained in that part of the answer to the amended complaint

which was stricken by the court. The parts so stricken from the answer to the amended complaint are a part of the record, as shown in this respondent's brief.

Petitioner takes the position that this matter was not subject to review, for the reason that no exception was taken by the respondent or preserved by incorporation in the bill of exceptions, citing cases. The bill of exceptions did assign striking parts of that answer as error, and the respondent's brief before the circuit court of appeals did cite: "No exception, or bill of exceptions is necessary to bring up for review a ruling of a Federal circuit court sustaining a demurrer to one of the defenses set up in the answer, there being nothing in the record to indicate a waiver of defendant's rights; therefore, we must consider the merits of that defense. Denver *vs.* Home Savings Bank, 236 U. S., 104; 59 L. Ed., 485; Nalle *vs.* Oyster, 230 U. S., 165; 57 L. Ed., 1439-1443; 33 Sup. Ct. Rep., 1043.

The appellate court, as a rule, can and does consider on a writ of error, the question, if there is subsequent evidence to support the judgment, and if there is not, the error is plain and the court may act on the want of evidence to support the judgment without exception taken. Boatmen's Bank *vs.* Trower Bros. Co., 104 C. C. A., 314; 181 Fed., 805.

The rule may be stated that an admittedly true statement of fact objected to as immaterial and irrelevant and objection sustained and exception taken, may support a review as to their sufficiency to support the judgment.

When the evidence is not contradictory in substantial points, the usual method of raising the issue as to the

sufficiency of the evidence to support the judgment, and so to have the facts reviewed, is by each party asking an instructed verdict. Union Nat. Bank *vs.* Oson Lumber Co., 103 C. C. A., 584; 179 Fed., 712, and cases cited: Keeley *vs.* Oplin Hill Consl. Min. Co., 95 C. C. A., 96; 189 Fed., 598; U. S. Rev. Stat., Sec. 700.

When there is an offer to prove a particular fact by witnesses, bill of exception should state the name of the witness, what it was expected to prove by him, the refusal to let the witness testify, the objection to the evidence and ruling thereon. Press Pub. Co. *vs.* Monteith, 103 C. C. A., 502; 180 Fed., 359-360.

The incontestability clause in this policy positively states that the policy is incontestable from date, and all statements made on which the policy was obtained are representations and not warranties, *in the absence of fraud*. In the examination of cases on this proposition not a single case quoted by petitioner or by the court has a similar provision. What is known as the Hurni Co. case, 263 U. S., 167; 68 L. Ed., 235, had an incontestability clause, which reads: "After this policy shall have been in force for one full year from the date hereof, it shall be incontestable," etc. The decisions seem to have turned upon the use of the words "in force," and the court held that the provision admitted of no other interpretation than that the policy became incontestable upon the sole condition that two years had elapsed.

In the Russ case, 14 Fed. (2d), 27, the language of the clause was: "This policy shall be incontestable after one year from its date of issue, except for non-payment

of premiums." In the Plotner case, reported 48 N. D., 295; 183 N. W., 1000, the clause is: "No oral or written misrepresentation made in the negotiations of a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or definite or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the made misrepresentation increases the risk of loss." In neither of these three clauses is there a reference to the quotation, "in the absence of fraud." If the application is a part of the policy, it seems to me even as to the inception of the facts on which the policy is issued, if fraudulent, should and does void the policy, on the ground that the conditions are not true and is a breach of the contract, and if rescission is made and the party in fault is made whole by the return of premium payments, that the contract would be considered canceled on the ground that fraud vitiates and destroys any contract, and no one can gain an advantage by his own criminal act. This should be specially true as to any and all transactions relating to the policy and occurring subsequent to the issue of the policy, and as to its facts the limitations imposed by the incontestability clause is not and should not be a bar.

The circuit court of appeals quoted in its decision: "We think the amount named in the policy in excess of Mosher's indebtedness to the bank (Dazey State Bank) at the time it was issued should be regarded, on the facts and offers of proof, as a wager on his death, and

to that extent void and nonenforceable, because against public policy," quoting: Bromley's Adm. *vs.* Washington Life Ins. Co., 92 S. W., 17; O'Connor's Admr. *vs.* Equitable Life Assurance Society, 186 S. W., 502; Clement *vs.* N. Y. Life Ins. Co., 46 S. W., 561. Respondent also calls the court's attention to construction given on incontestability clauses similar to this: Dakota Life *vs.* Morgan (S. D.), 199 N. W., 43. Offer to show no knowledge of fraud and after getting information of the fraud, immediate steps were taken to rescind and restore what it had received in premium payments, where defense of fraud is made can be considered after expiration of the time fixed for incontestability. Welch *vs.* Union Central Life, 108 Iowa, 224; 78 N. W., 853, policy incontestability clause from date, where defense of fraud is available; rescission was made and judgment was affirmed for company; Regan *vs.* Union Mutual Life Ins. Co., 189 (Mass.), 555; 2 L. R. A., (N. S.), 821; 76 N. E., 217; 4 Ann. Cas., 362; Ritter *vs.* Ntl. Life Ins. Co., 169 U. S., 139; 42 L. Ed., 693; Ntl. Life Ins. Co. *vs.* Rose, 294 Fed., 122.

Petitioner contends that the dictum in Conn. Mutual Life Ins. Co. *vs.* Schaefer, 94 U. S., 457, 462; 24 L. Ed., 251, to the effect that "the amount of insurable interest is the amount of the debt," does not accurately state the law on this subject, citing a number of cases.

In our opinion this holding would be absolutely true, and should be true, if there is no debt for which the policy was issued, or there is no debt to secure for which the assignment was made, or if the debt has been partially paid, or all paid, then the policy should be

payable, and is payable to the beneficiary named in the policy. That seems to be the trend of the decisions, and it seems to be based upon good reason, and justice is done by such construction of the law.

An examination of the Schaefer case shows there was no assignment in that litigation. In the cited case of Insurance Co. *vs.* Mowry, 96 U. S., 544, 545; 24 L. Ed., 674; by petitioner, the decision was given on an oral agreement, which was held invalid and the judgment for beneficiary was reversed. In the cited case of Conn. Mutual Life Ins. Co. *vs.* Lucks, 108 U. S., 498; 27 L. Ed., 800, the facts showed there was a joint policy and the ex-partner was entitled to recover the interest he had in his partners affairs.

The decision of Crotty, plaintiff in error, *vs.* The Union Mutual Life Insurance Company of Maine, 144 U. S., 621; 36 L. Ed., 566, Justice Brewer states: "Without noticing other questions discussed by counsel, it is sufficient to consider that of plaintiff's interest in the policy. It is the settled law of this Court that a claimant under a life insurance policy must have an insurable interest in the life of the insured. Wagering contracts of insurance have been repeatedly denounced. In Cammack, Jr., *vs.* Lewis, 82 U. S., 643; 15 Wall., 643 (21 L. Ed., 244), in which a policy of $3,000, taken out to secure a debt of $70, was declared "a sheer wagering policy." Conn. Mutual Life Ins. Co., *vs.* Schaefer, 94 U. S., 457 (24 L. Ed., 251), in which it was stated: "In cases where the insurance if effected by way of indemnity as where a creditor insures the life of his debtor, for the purpose of securing his debt, the amount of the insurable interest is

the amount of the debt." In Warnock *vs.* Davis, 104 U. S., 775 (26 L. Ed., 924), if a policy of insurance be taken out by a debtor on his own life, naming a creditor as beneficiary, or with a subsequent assignment to a creditor, the general doctrine is *that on payment of the debt*, the creditor loses all interest therein and the policy becomes one for the benefit of the insured and collectable by his executors or administrators. In 2 May Ins. (3d ed.), Section 459-A, the author says: "A creditor's claim upon the proceeds of insurance intended to secure the debt, can go no farther than indemnity, and all *beyond the debt, premiums and expenses*, should go to the debtor and his representatives, or *remain with the company*, according as the insurance is upon life or on property." Central Bank of Washington *vs.* Hume, 128 U. S., 195 (32 L. Ed., 370). The plaintiff (Crotty) alleged that he was creditor AT THE TIME OF THE CONTRACT and at the time of death. The promise of the policy is to pay Michael Crotty, his creditor, if living, and it is contended that this is an admission on the part of the company sufficient to justify a verdict against it. If an admission at all, it is good only as an admission of the date at which it was made, to-wit: THE DATE OF THE POLICY. The relation of debtor and creditor is not a permanent one, like that of parent and child, but one which may vary from day to day, changing both in fact and amount, according to the successive business transactions between the parties. So, admission of proof that the relationship of debtor and creditor existed between two parties at one date is not admission of proof that months there-

after the same relationship and to the same amount subsisted.

Justice between the parties and public policy have denounced wagering contracts and does require that the proof of indebtedness should be DISTINCT AND SATISFACTORY. It would tend to a satisfactory consummation of wagering contracts in insurance, if the mere recital in the policy was held sufficient to sustain a recovery in favor of the alleged creditor.

Invalidity of the Two $5,000 Notes.

The two notes were sham; they were obtained by trickery and deceit; there was no consideration; petitioner, by its agent, obtained the same to J. E. Jacobson to be endorsed to the petitioner; the act was an illegal one; J. E. Jacobson received no credit, no money on the notes; Mosher was not the debtor of any one other than the Dazey State Bank, and was not a debtor to Jacobson or the petitioner; the notes are subject to any defense made by the respondent that would nullify them; the respondent was induced to approve the assignment of the policy, made after the Dazey State Bank closed, not knowing the conditions under which the notes and the assignment were made. If those facts were not known *at the time* the notes were received, it is sufficient to state that they are known now from the testimony and the offer to prove. There was no collateral agreement with reference to the notes and the assignment made pledging the notes and the assignment as the security for the payment of anything. There was an entry only in a so-called

"collateral card record," that the notes and policy were received; there was no showing that it was made by the direction or had the consent of any one. A former agreement dated in February, 1921, was received in evidence, but the evidence shows that the insurance policy and notes were not pledged under that agreement. The witness for the petitioner was precluded from testifying, by the court, for what purpose the bank received the notes and assignment after he had admitted that the notes and insurance policy transaction was by correspondence. He might have talked about it, but did not remember what he said; that there was a letter sent relating to the transaction, but the correspondence was not produced and was not placed in evidence; the showing that there was a special agreement, if any, that petitioner tried to establish, but failed to prove it. Were it offered, it would be, if anything, a limited assignment. The special agreement and the nature of the assignment is not proved. There was no subsequent advance and the evidence was ruled out by the court, on the ground that the proffered testimony as to advances made to Jacobson, showed the advances made after the sale was made under the pledge. No other advances subsequent to the assignment were shown. This transaction is not governed by the law relating to negotiable instruments; the collateral security was non-negotiable; there is no testimony to show that the purchaser is a bona fide purchaser; there is no testimony that the notes were presented within a reasonable time, and not being presented, the holder is not an endorsee in due course.

"Where an instrument payable on demand is negotiated, an unreasonable length of time after its issue, the holder is not deemed a holder in due course." Section 7096, General Statute, Minnesota, 1923. A demand note negotiated two months and over, after its date, is past due and subject to all defenses. Losee *vs.* Duncan, 7 Johns, N. Y., 70; 5 Am. Dec., 245; Northern Crown Bank *vs.* Natl. Electric Co., Ann. Cas., 1912-A., 476.

The rule is stated in Jones on Collateral Securities, 3d Ed. (1912), at Section 360-A: "Whatever may be the law in the case of chattels in payment of a pre-existing debt, when the debt is thereby discharged, we think that by the weight of authority the pledging of chattels as security for pre-existing debt, when there is no present consideration whatever for the pledge, does not constitute the plegee a holder for value." The author cites the decisions of the court of last resort of Massachusetts, Indiana, Pennsylvania and of the United States.

If a third party, without any consideration personal to himself, gives his note to a creditor as collateral for a mere naked debt of another without any circumstances of advantage to the debtor or disadvantage to the creditor, the note is without consideration. Turle *vs.* Sargent, 63 Minn., 211; West Coast Co. *vs.* Bradley, 111 Minn., 343. Fraud in procuring a signature to an instrument by misrepresentation, renders the instrument void, not merely voidable. There is no contract in such case. The defrauded party may deny that he executed it. Aultman *vs.* Olson, 34 Minn., 450; 26 N. W., 451.

Negligence of the defrauded party is not available to the person making the misrepresentation. Aultman *vs.* Olsen, *Supra;* Van Meter *vs.* Nunn, 116 Minn., 444; 133 N. W., 1012. Where a promissory note is procured by fraud and misrepresentation, there is no legal execution nor delivery of it, and it is of no legal force nor effect. Marlatt *vs.* Couture (N. D.), 169 N. W., 582; Stevens *vs.* Barnes (N. D.), 175 N. W., 709. In the case of Stevens *vs.* Barnes, *Supra*: The third syllabus is "fraud, at the inception of the alleged contract and note having been established, the burden shifted to the endorsee to prove by evidence that he was a good-faith purchaser for value, before maturity, without notice." This he has failed to do.

The record in this case shows that the petitioner has failed to show that it received the notes in good faith and for a valid consideration.

The petitioner cannot claim good-faith in obtaining the title to the notes and the assignment, because it had notice of the respondent's claim that the policy was void, had been rescinded, and it had service of summons and complaint, setting up the facts as they were, and asking for the cancellation of the policy. The sale of the pledged property, if it was pledged, was made without notice to the respondent by the petitioner.

Assignment of the Policy.

This assignment was made after the Dazey State Bank closed. This assignment was approved subject to the terms and conditions of the policy and without

responsibility as to the validity thereof on the part of the respondent. This assignment was approved without knowledge of the facts relating to the getting of the notes or the conditions under which the policy was illegally obtained. The respondent obtained the information after the assignment was approved. That all the paid premiums had been made by the Dazey State Bank. There was no necessity, at any time, to consider future premium payments, because of the physical ailment affecting the insured, and from which disease he died. It was only a matter of waiting for a short time for the sure results of a shortened life and probable death of the insured.

Respondent contends that the rights of the assignee correspond to the right that the assignor has and that it is subject to all defenses relating to its validity or force and effect. Courts hold that the validity of the assignment depends upon a bona fide transaction and not on mere speculative insurance and that it is not of a policy issued to circumvent the law against wagering policies. Courts which hold assignments void proceed upon the theory, that it being against public policy to allow to take insurance upon a life in which he has no interest, the same objections exist against an assignment to one having no interest, since the law will not permit that to be done by indirection which it prohibits being done directly.

Good faith in the transaction of an assignment is required, and the courts do not hesitate to condemn a policy issued for the purpose of having it assigned. See valuable note to Metropolitan *vs.* Elison (Kans.),

3 L. R. A., (N. S.), 934; Rahders, Merritt and Hagler *vs.* Peoples Bank of Minneapolis *et als.*, 113 Minn., 496.

The question as to the validity of an assignment of a life insurance policy to one who has no insurable interest in the life of the insured has been held to be one dependent on general law as to which the Federal courts should exercise an independent judgment. Kopetovske *vs.* Mutual Life Ins. Co., 187 Fed., 499; 111 C. C. A., 265; 27 Ann. Cas., 865.

And this is true even where the assignee purchases at a judicial sale. Irons *vs.* U. S. Life Ins. Co., 108 S. W., 904 (Ky.); 129 Am. St. Reps., 318.

An assignment must be in good faith, and not a mere colorable evasion of the law in regard to wagering contracts, before it will be upheld by a court. Clement *vs.* Insurance Co., 101 Tenn., 20; 70 Am. St. Rep., 630; Keystone, etc., Ben. Assn. *vs.* Norris, 115 Pa. St., 446; 2 Am. St. Rep., 572.

It also seems to be generally held that the assignee is entitled to recover the sums actually advanced by him upon the policy, even though the assignment may be void as to the proceeds in excess of such advancement. Cammack *vs.* Lewis, 15 Wall. (U. S.), 643; Warnock *vs.* Davis, 104 U. S., 775; Cawthon *vs.* Ferry, 76 Tex., 338; Lewy *vs.* Gilliard, 76 Tex., 400; Raller *vs.* Beam (Va.), 6 L. R. A., 136; Basye *vs.* Adams, etc., 81 Ky., 375; Weisert *vs.* Muehl, 81 (Ky.), 341.

Where a debtor made several assignments of one fund, the second assignment being given merely to secure loans already made, *and no further* loans being made in reliance thereon, the second assignment is not

one for a valuable consideration, and the second assignee cannot claim priority though taking without notice of the first assignment. Davis *vs.* Coggin *vs.* State Bank of El Paso, 156 S. W., 321 (Texas); 5 *C. J.*, Sec.. 90, p. 931.

Assignee has no greater right than assignor had. Bellman *vs.* Home Insurance Co., 189 N. W., 1028 (Wis.); 27 A. L. R., 945.

Assignment to first wife, changed by insured to second wife after death of first wife, held that delivery and possession was presumed to have been in first wife and second assignment was void. Devin *vs.* Conn. Mutual, 158 Pacific, 435 (Okla.); L. R. A., 1916 F, 783.

Note of $3,000 given without consideration, except $70 debt and agreement to give $1,000 to the wife, held to be a wager contract, on claim of the wife as administratrix of the estate of the insured, and that it was entitled to balance over what was owed to or advanced by assignee, and that assignee can claim only what was owed or advanced. Cammack *vs.* Lewis, 15 Wall., 643-649; 21 U. S. (L. Ed.), 244.

As to sale of pledge, the doctrine of trust applies to public as well as private sales and where assignee purchases, the assignee is trustee of funds only, and can hold only his interest. Irons *vs.* U. S. Life Insurance Co., 108 S. W., 904 (Ky.); 129 A. S. R., 318.

Approval does not estop company from contesting the validity of the assignment or of the policy. Franklin Insurance Company *vs.* Wolff (Ind.); 54 N. E., 772.

Assignment procured by fraud is void. 37 *C. J.*, Section 143, notes 15 and 16, page 434; 37 *C. J.*, Sec-

tion 336, page 572, "Invalid Assignments Generally" and notes.

The facts in this case are peculiar, the insured and his wife are joint makers of the two notes and of the notes to the Dazey State Bank; the personal property of the widow, Sophia Mosher, is pledged for the payment of the notes renewed to Dazey State Bank; the petitioner holds one of those notes, amounting to $2,010.86; the Banking Department of North Dakota holds another note of $682.98 against Sophia Mosher; both holders have asked for payment by Sophia Mosher; the payment of these two notes appear to be secured by this policy; the policy has been cancelled, so far as to the estate of the insured, in the North Dakota action, and there is no further liability to the estate of the insured; however, there is a liability to the parties holding the two notes and to the co-maker, Sophia Mosher, with Oscar Mosher, for the payment of the said notes. Sophia Mosher was not made a party to the action cancelling the policy, personally, but in a representative capacity only, as administratrix; the North Dakota Banking Department did not appear; J. E. Jacobson died; the receiver of the Dazey State Bank was relieved from duty, and his successor was not served and did not appear; the respondent relies upon the right to rescind and to pay back what it had received in the shape of premium payments; if its contention is correct, then there is a fund of $1,102.20 and interest thereon which could be applied to the payment of the note held by the North Dakota Banking Department and in the event that the assignment to the petitioner,

covering the $2,010.86 note held by it, then the funds consisting of premium payments returned, could be applied proratedly to the two holders of the two notes. If the cancellation of the policy is held not binding on the petitioner, and if it is held that the limited assignment is valid to the extent of the debt of the Dazey State Bank to the petitioner, then the $2,010.86 note held by it as collateral for the debt of the Dazey State Bank would be recoverable from the respondent.

Petitioner cannot claim surprise as to the issue of the wager and non-existence of insurable interest claimed by respondent and decided by the circuit court of appeals on the brief made by the respondent here and plaintiff in error in said circuit court of appeals.

The respondent claims that decision of the circuit court of appeals in this case is a decision only relating to the matter of a wagering contract and that this decision as made, does not preclude consideration of matters interwoven and connected with that decision, relating to the validity of the policy and the validity of the assignment, and that all of the issues had been decided in that one respect only, because all of the facts existing were considered in making the decision. A chain of facts are and were essential to make the decision. The events from the beginning, starting with the application, to the death of the insured, are all matters connected with the transaction as a whole.

The petitioner calls attention to the North Dakota Law, Section 6628 and Section 6631; Section 6628 is the law covering wager contracts as to life insurance in North Dakota; provisions of Section 6631 are not

applicable, for the reason that the testimony offered and testimony admitted, shows that the interest is subject of exact pecuniary measure and for the further reason that it is not a general assignment of the policy but one for indemnity only, upon the life of Oscar Mosher, and the amount thereof is one to be established by the petitioner.

There is no question about the position of the Dazey State Bank; in either holding, that the incontestability clause does or does not exclude a defense, if it does not exclude a defense, there is still $1,102.20 and interest thereon to be distributed for the benefit of the parties holding claims secured by the policy; if it does exclude a defense, then the matter of the payment of the two notes is a liability of the respondent.

Considering the matters in this case from beginning to the present time, I feel like observing that the legislation on insurance relating to fraud and incontestability clauses, and the varied policy clauses made in the past and up to the present time on the two propositions, and the decisions rendered thereon by courts of last resort in this State and in the United States resembles the labyrinth of King Minos of Crete, from which there is no escape, or resembles a knot, that cannot be untied by strength of mind, and when you consider the multitude of laws and of cases cited, having a bearing on the facts in this case and the law applicable thereto, it is a Herculean task for mind and time. There is, however, a matter of simplicity about it, if considered, free from the maze of law, contract provisions, by the ordinary man making himself con-

versant with the facts, he could tell what is right and what is wrong in this case.

The divine law forbids taking property from others; the human law makes the taking of others' property, by stealth, if the value is in excess of $20.00, a felony; the taking of $10,000 from the respondent in this case would make it a breach of divine and human law.

The claim comes garbed in shoddy clothes, made up of many worn-out decisions and based upon many odds and ends of laws and repeals. When Christ found the money changers in the temple plying their trade, he was aroused to wrath and drove them out of the temple (the house of justice), and said "This is the house of God (justice), you have made it a den of thieves."

Respondent respectfully asks the court to affirm the judgment of the circuit court of appeals.

JOHN B. HANTEN,
Counsel for Respondent,
Watertown, S. D.

SUPREME COURT OF THE UNITED STATES.

No. 425.—October Term, 1927.

Midland National Bank of Minneapolis, Petitioner, *vs.* Dakota Life Insurance Company.	On Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[May 28, 1928.]

Mr. Justice Brandeis delivered the opinion of the Court.

The Midland National Bank of Minneapolis brought this action, in 1923, in a state court of Minnesota. It sought to recover on a policy of life insurance for $10,000 issued by the Dakota Life Insurance Company in the year 1920. The defendant, a South Dakota corporation, removed the cause to the federal court. There the case was tried before a jury. It was alleged and proved that the policy had been issued in North Dakota on the life of Oscar Mosher, payable to his estate; that it was assigned to the plaintiff in 1923 in North Dakota by Mosher and one Jacobson, a prior assignee; that the assignment recited that it was given to secure payment to the Bank of the sum of $10,000 according to the tenor and conditions of two promissory notes; that two demand notes for $5,000 each, signed by Mosher, had been given to the Bank by Jacobson as collateral for the latter's indebtedness to it in a larger amount; that the assignment bearing the approval of the Company was delivered to the Bank about the same time that it received the collateral notes; that of these notes the Bank became the absolute owner by foreclosure; that no part of them had been paid; that Mosher died soon after giving the notes, while the policy was in force; and that proofs of death had been duly furnished before this action was begun.

The answer to the amended complaint alleged, among other things, that the policy had been obtained from the Company through a fraudulent conspiracy entered into by Mosher, Jacobson and the Dazey State Bank, of which the latter was president; that the two collateral notes were obtained from Mosher by fraud

and without consideration; and that the Company when it approved the assignment to the plaintiff was unaware of these facts. On the plaintiff's motion the court struck out the paragraphs of the answer alleging that the policy had been procured by fraud, on the ground that under the statutes of North Dakota the policy had become incontestable; and it struck out also certain other paragraphs making "allegations in reference to equities of third parties in connection with the assignments of the policy in suit." The Company then filed an amended answer. This answer again set up the alleged invalidity of the assignments, the fraud on Mosher in obtaining the notes, and the want of consideration for the latter. It also alleged that in proceedings instituted by the Company in North Dakota the policy had been cancelled. Evidence in support of the latter allegation was excluded at the trial, on the ground that the Bank had not been brought within the jurisdiction of the North Dakota court. The Company then made an offer of proof in support of its allegation that the notes and the assignment had been obtained by Jacobson from Mosher by trickery and without consideration. On the Bank's objection all this evidence was excluded.

At the close of the evidence each party asked for a directed verdict. On admissions contained in the pleadings and on the evidence, the trial court found that the notes were taken by the Bank as security for a pre-existing debt, and held that, since under the law of North Dakota and of Minnesota a pre-existing debt constitutes value, the plaintiff was a holder for value of the notes and was entitled to recover on the policy assigned to secure their payment; and it assessed the damages for the full amount claimed, that is, $10,000 (less an unpaid installment of premium) and interest. The Circuit Court of Appeals held that the several offers of proof were properly rejected; and that the Bank was entitled to recover on the policy. But it reversed the judgment and remanded the case on the ground that, when issued, the policy was a wagering contract except to the extent that it was reasonably required as security for a debt which it assumed that Mosher owed, in the amount of $5,686.08, at the time of the issue of the policy, to the local bank of which Jacobson was president. It said: "So we conclude on the facts stated that the policy was a good and valid contract to the extent of Mosher's indebtedness to the Dazey State Bank on May 14, 1920, and that the court erred in excluding the tendered proof. If the tender should be made good and the

case does not present a materially different aspect from the record before us, plaintiff should have judgment for that amount with interest from the service of summons." 18 F. (2d) 903, 905. This Court granted a writ of certiorari. 276 U. S. —.

The action of the Court of Appeals was unjustified on the record before it. While the original answer had alleged that the policy was taken out with a view to its assignment to the Dazey State Bank and was so assigned some two months after its issue, these allegations were struck out by order of the court, to which the defendant took no exception. We may assume, though we do not so decide, that the defense of a want of insurable interest and the consequent illegality of the insurance contract, is one that may be raised by the court though not properly pleaded. See *Coppell* v. *Hall*, 7 Wall. 542, 558; *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 267; *Higgins* v. *McCrea*, 116 U. S. 671, 685. But here there is nothing, either in the admitted facts, or in the evidence received, or in that offered and excluded, which tends to show such illegality.

The policy was taken out by the insured and was payable to his estate. It is true that the amended answer alleged that all the premiums were paid by the Dazey State Bank, but this was denied on information and belief in the reply, and no evidence was produced in its support. None of the evidence received or excluded had any bearing upon the circumstances under which the policy was issued. Whether if such evidence had been offered, it should have been excluded because of the provisions of the North Dakota statutes making policies incontestable after two years, or for other reasons, compare *Finnie* v. *Walker*, 257 Fed. 698, we have no occasion to consider. Plainly the assignment of the policy later would not render it void, whatever the lack of insurable interest on the part of the assignee. *Grigsby* v. *Russell*, 222 U. S. 149. The judgment of the Circuit Court of Appeals is reversed with direction that the judgment of the District Court be affirmed.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.